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No. ——

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1998

SBC COMMUNICATIONS INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

WILLIAM T. LAKE
JOHN H. HARWOOD II
DAVID G. GRAY
SAMIR C. JAIN
WILMER, CUTLER & PICKERING
2445 M St., NW
Washington, D.C. 20037
(202) 663-6000
Counsel for U S WEST, Inc.

MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K St., NW, Suite 1000W
Washington, D.C. 20005
(202) 326-7900
Counsel for SBC entities

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

WALTER E. DELLINGER
O'MELVENY & MYERS
555 13th St., NW, Suite 500W
Washington, D.C. 20004
(202) 383-5300

DONALD L. FLEXNER
JOHN I. STEWART, JR.
CLIFTON S. ELGARTEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 624-2500
Counsel for SBC entities

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MARK D. ROELLIG
DAN L. POOLE
ROBERT B. MCKENNA
U S WEST, INC.
1801 California St.
51st Floor
Denver, CO 80202
Counsel for U S WEST, Inc.

JAMES D. ELLIS
LIAM S. COONAN
MARTIN E. GRAMBOW
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, TX 78205
Counsel for SBC entities

QUESTION PRESENTED

Whether the "Special Provisions Concerning Bell Operating Companies" of the Telecommunications Act of 1996 —provisions that single out 20 companies alone and by name for disabilities of a type this Court has repeatedly concluded constitutes punishment—violate the Bill of Attainder Clause and the separation of powers.

PARTIES TO THE PROCEEDING

SBC Communications Inc.
Southwestern Bell Telephone Company
Southwestern Bell Communications Services, Inc.
Southwestern Bell Communications Services - Texas, Inc.
Southwestern Bell Internet Services, Inc.
Pacific Bell
Pacific Bell Communications
Nevada Bell
U S WEST Communications, Inc.
Bell Atlantic Corporation
Federal Communications Commission
United States of America
MCI Telecommunications Corp.
American Telephone & Telegraph Corporation
Association for Local Telecommunications Services
Competitive Telecommunications Association
National Cable Television Association
Sprint Communications Company
Telecommunications Resellers Association

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners advise the Court as follows.

SBC Communications Inc., which has shares outstanding in the hands of the public, has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco, Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV)

Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

Southwestern Bell Telephone Company, Southwestern Bell Communications Services, Inc., Southwestern Bell Communications Services-Texas, Inc., Southwestern Bell Internet Services, Inc., Pacific Bell, Pacific Bell Communications, and Nevada Bell, which are all subsidiaries of SBC Communications Inc., have no nonwholly owned subsidiaries. Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell have publicly held debt.

U S WEST, Inc. has no parent companies or nonwholly owned subsidiaries.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

SBC Communications Inc., U S WEST, Inc., and the SBC subsidiaries identified below [1] petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-53a) is to be reported at 154 F.3d 226. The district court's opinion granting summary judgment in favor of SBC Communications and the other plaintiffs (Pet. App. 54a-73a) is reported at 981 F. Supp. 996.

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[1] The SBC subsidiaries that are petitioners here are Southwestern Bell Telephone Company, Southwestern Bell Communications Services, Inc., Southwestern Bell Communications Services-Texas, Inc., Southwestern Bell Internet Services, Inc., Pacific Bell, Pacific Bell Communications, and Nevada Bell.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bill of Attainder Clause (Art. I, § 9, Cl. 3) of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

The relevant portions of the statute at issue here, the Telecommunications Act of 1996, are reproduced at Pet. App. 78a-144a.

STATEMENT OF THE CASE

A. Introduction.

A sharply divided panel of the Fifth Circuit has issued a decision of far-reaching importance on an issue that goes to the heart of our Nation's constitutional separation of powers.

The Framers understood that Congress, as a representative body susceptible to popular clamor, should not be allowed to enact punitive legislation based on individualized judgments about particular private parties—that some individuals or groups are good, while others are bad; that some will follow the law, while others will break it unless subjected to special forms of coercion or deterrence. Accordingly, the Constitution—and, in particular, the Bill of Attainder Clause—requires that, when Congress imposes burdens, it must do so through rules applicable to all parties that exhibit the same specified characteristics. It is the job of the *other* Branches to apply those rules to determine which individuals possess those characteristics. As this Court first explained nearly two centuries ago, "[i]t is the peculiar province of the legis-

lature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). By ensuring that Congress acts only by "set[ting] forth a generally applicable rule" imposing disabilities on all parties who engage in the same conduct (*United States v. Brown*, 381 U.S. 437, 450 (1965)), the Bill of Attainder Clause serves as "a general safeguard against legislative exercise of the judicial function" (*id.* at 442).

For more than 200 years, Congress has largely abided by this constitutional constraint. Never before has it singled out named companies to forbid them, and them alone, from engaging in otherwise lawful lines of business. But Congress did just that in the "Special Provisions Concerning Bell Operating Companies" (47 U.S.C. §§ 271-275), passed as part of the Telecommunications Act of 1996 ("the 1996 Act"). These "Special Provisions" do not set forth *any* generally applicable criteria governing which private entities may provide telecommunications services. Rather, the Special Provisions *single out 20 Bell operating companies by name on the face of the statute*, and forbid that closed class of companies—and no other entities—from engaging in otherwise lawful lines of business, including the $70 billion long distance market. The disabilities imposed by the Special Provisions—disabilities that "bar[] designated individuals or groups from participation in specified employments"—are precisely the type that, for more than a century, this Court has held to be flatly "impermissible" under the Attainder Clause. *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 474 (1977); *see Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867); *United States v. Lovett*, 328 U.S. 303, 316 (1946); *Brown*, 381 U.S. at 447-48.

In the teeth of these precedents, a two-judge majority of a Fifth Circuit panel concluded that Congress's decision

to single out the Bell operating companies by name for these burdens did not violate the separation of powers principles embodied in the Attainder Clause. In the process, the panel majority transformed the Bill of Attainder Clause from a robust protection against legislative usurpation of the judicial role into an amorphous standard that provides no real limit on congressional power. As the panel majority understood the issue, the Constitution gives Congress free rein to impose any burdens it desires on named entities so long as a court can later discern a "prophylactic" purpose for that decision—whenever, that is, a court concludes that Congress's collective "intent" was to constrain those particular parties' supposed *future* proclivities, rather than to address their past acts. *See* Pet. App. 18a-19a.

The Fifth Circuit's decision merits this Court's review for several reasons.

First, the court of appeals has radically reinterpreted Attainder Clause jurisprudence in a way that drains that clause of nearly all meaning. Almost any statute penalizing named persons could be defended as an attempt to prevent misdeeds in the future. Ironically, the more innocent the target—the fewer findings of past misbehavior—the easier it would be to frame the punishment as "prophylactic." Congress would be free to single out unpopular companies, groups, and even individuals for special disabilities, so long as Congress (or a court purporting to divine Congress's intent) could articulate a forward-looking reason for the restriction. Even a paradigm case of an attainder—for instance, banning named individuals from government employment based on congressional suspicion of Communism—could be justified as designed to protect the public from subversive activities. That is itself a subversion of the Attainder Clause, which was intended to be a fundamental structural limitation on congressional power.

Second, the panel majority frankly acknowledged confusion concerning the decisions of this Court. *See, e.g.,* Pet. App. 41a n.30 (stating that, like a "Christmas pie," this Court's opinions "provide a little something for every taste"). Uncertainty in the lower courts is further demonstrated by the fact that both the Fifth Circuit here and the D.C. Circuit in a related case were sharply divided as to the meaning of this Court's Bill of Attainder Clause precedents and their application to the Special Provisions. *See BellSouth Corp. v. FCC,* 144 F.3d 58 (D.C. Cir. 1998) (petitions for rehearing pending) (upholding the Special Provisions' electronic publishing restrictions over Judge Sentelle's dissent on Bill of Attainder Clause grounds). The Court should review this case to provide the lower courts—and Congress—with needed guidance as to the rules governing the legislature's ability to impose burdens on a targeted few.

Third, the Fifth Circuit's conclusion that the Special Provisions pass constitutional muster is important in and of itself. As this Court has emphasized, the 1996 Act is "an unusually important legislative enactment." *Reno v. ACLU,* 117 S. Ct. 2329, 2337 (1997). The statute overhauls one of our Nation's most important industries at a time of enormous change and growth in the communications marketplace. There is a significant national interest in ensuring that the 1996 Act is constitutionally sound and does not improperly deprive consumers of the benefits of allowing some of our Nation's largest and best run communications companies to compete in highly important markets. That interest is at least as substantial as those that prompted the Court to grant review as to the purely statutory issues raised by a Federal Communications Commission ("FCC") Order implementing other parts of the 1996 Act. *See AT&T Corp. v. Iowa Utilities Board,* Nos. 97-826 *et al.*

B. Regulatory Background.

1. In 1982, AT&T and the United States agreed to settle a long-pending antitrust suit alleging that AT&T had used its purported strategic "bottleneck" over local telephone service to monopolize the long distance and telecommunications equipment markets. The resulting AT&T Consent Decree (as it is referred to in the 1996 Act) required AT&T to divest itself of 20 Bell operating companies (or "BOCs") that provide local telephone service to much of the Nation. For purposes of that divestiture, the BOCs—who were not themselves defendants to the lawsuit—were grouped into seven unaffiliated companies known as Regional Bell Operating Companies (or "RBOCs"). SBC and U S WEST are RBOCs.

The AT&T Consent Decree reflected no findings of guilt, nor did it affect the BOCs' exclusive franchises to provide local service in at least some part of nearly every State. However, precisely because the BOCs' state franchises gave them alleged "bottleneck" power over local exchange facilities, the Decree precluded the BOCs from engaging in certain other lines of business, including long distance telecommunications, information services, and the manufacture of telecommunications equipment. But none of those limitations was intended to be permanent.[2] In fact, the federal district court that oversaw the Decree lifted many of these restrictions in the years after the Decree's approval, and had pending before it a motion to vacate the remaining restrictions at the time the 1996 Act was passed.

2. On February 8, 1996, President Clinton signed the 1996 Act into law. A major purpose of the statute was to deprive local telephone companies of their exclusive franchises and to open all local telecommunications markets to competition. In so doing, the 1996 Act eliminated

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[2] *See United States v. AT&T*, 552 F. Supp. 131, 225 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

the basic premise of the line-of-business restrictions in the AT&T Consent Decree: that the BOCs have a franchised "bottleneck" monopoly.

As the Court is aware from its review in *Iowa Utilities Board*, one of the 1996 Act's most fundamental changes is the establishment of a comprehensive statutory scheme designed actively to encourage local competition. New sections 251 through 253 of the Communications Act preempt state and local regulations that would prohibit new competitors from entering the local exchange markets; mandate the opening of local exchange facilities to competitors; and require *all 1,300 incumbent local exchange carriers* (or "incumbent LECs")—including the 20 BOCs—to assist competitors that wish to use the incumbents' existing local exchange networks to provide their own local exchange service.[3] Taken together, these obligations eliminate any vestige of the local "bottleneck" by requiring incumbent LECs to dedicate portions of their local telephone networks for the exclusive use of competitors seeking to enter that market.

With elimination of the local exchange bottleneck came elimination of the AT&T Consent Decree. In section 601 (a)(1) of the 1996 Act, Congress directed that "[a]ny conduct or activity that was . . . subject to any restriction or obligation imposed by the AT&T Consent Decree" shall no longer be subject to that Decree, but shall instead be subject to the restrictions and obligations of the Act. Pub. L. No. 104-104, § 601, 110 Stat. 143, 47 U.S.C. § 152 note. The district court that had entered the De-

[3] In particular, new section 251(c), 47 U.S.C. § 251(c), requires each incumbent LEC: (1) to allow competitors to interconnect their own networks to those of the incumbent; (2) to provide competitors with access to "unbundled network elements"—individual pieces of the LEC's network—at reasonable and nondiscriminatory rates, terms, and conditions; and (3) to offer to competitors at wholesale rates all the complete telecommunications services currently offered at retail by the incumbent LEC, so that the competitors may then resell those services.

cree accordingly vacated it shortly after the Act became law. *See United States v. Western Elec. Co.*, 1996-1 Trade Cas. (CCH) ¶ 71,364 (D.D.C. Apr. 11, 1996).

3. For the overwhelming majority of the Nation's 1,300 incumbent LECs, Congress stopped at mandating open access to their local exchange facilities. For the 20 BOCs, however, Congress went much further and enacted statutory provisions without precedent in our constitutional history. In the "Special Provisions Concerning Bell Operating Companies," Congress singled out these 20 companies—alone and by name—for additional restrictions that prevent them from competing in otherwise lawful lines of business. *See* 47 U.S.C. § 153(4) (defining the term "Bell operating company," to which the Special Provisions apply, as any of the 20 named companies).

First, new section 271 of the Communications Act prohibits the BOCs from offering long distance services to customers in any State where they have any local exchange operations whatsoever (however limited). A BOC may not escape that prohibition in any State unless and until the FCC determines that the BOC has, among other things, satisfied an onerous 14-point "competitive checklist." 47 U.S.C. § 271(d)(3). The FCC has granted no such approvals in the more than 2½ years since the 1996 Act was passed.[4] Even after the FCC ultimately grants such relief, moreover, the statute authorizes that

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[4] Just days ago, the FCC issued yet another order rejecting a BOC's application to provide long distance service and, in so doing, promulgated 140 pages of detailed requirements a BOC must satisfy to meet the FCC's understanding of section 271's requirements. Memorandum Opinion and Order, *Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, FCC 98-271 (rel. Oct. 13, 1998). Even after obtaining a favorable determination by the FCC, the BOCs still may not offer long distance services themselves; for at least three years, such services may be provided only by corporate affiliates that meet strict and costly structural separation requirements. *See* 47 U.S.C. § 272.

agency to withdraw long distance authority at any time. *Id.* § 271(d)(6).

Second, new section 273 prohibits any BOC from manufacturing and selling telecommunications equipment for as long as it is prohibited from providing long distance services throughout its own region under section 271. *Id.* § 273(a). Additionally, a BOC may *never* engage in any manufacturing joint venture with another BOC or BOC affiliate, even if long distance authority is granted. *Id.*

Third, new section 274 provides that, for four years, a BOC may not directly engage in "electronic publishing" (which includes providing materials such as news, editorials, and literature) that is disseminated by means of the BOC's basic telephone service. *Id.* § 274. Prior to passage of the 1996 Act, the BOCs engaged in electronic publishing without restriction. *See United States v. Western Elec. Co.,* 993 F.2d 1572 (D.C. Cir.), *cert. denied,* 510 U.S. 984 (1993).

Fourth, new section 275 prohibits the BOCs from providing alarm monitoring services—even through a separate affiliate—for five years. 47 U.S.C. § 275. Again, prior to passage of the 1996 Act, the BOCs had been free to engage in alarm monitoring. *See United States v. Western Elec. Co.,* 767 F. Supp. 308 (D.D.C. 1991), *aff'd,* 993 F.2d 1572 (D.C. Cir.), *cert. denied,* 510 U.S. 984 (1993).

C. Proceedings Below.

1. SBC, joined by intervenor U S WEST, brought this lawsuit so that they could operate their businesses under the same rules that now apply to each of the more than 1,300 other incumbent LECs. This suit does not challenge the provisions of the 1996 Act that fundamentally restructure the telecommunications industry by eliminating exclusive local franchises and requiring *all* incumbent

LECs to allow competitors to use the incumbents' own networks to compete for local telephone customers. Onerous as those provisions are, they are rules of general applicability. Rather, SBC and U S WEST challenge *only* the Special Provisions—statutory sections that prohibit the named BOCs, and those companies alone, from competing in valuable and growing markets.

The district court agreed with SBC and U S WEST that the Special Provisions violate the Bill of Attainder Clause and the separation of powers. Emphasizing that the Special Provisions are "extraordinary, and in fact unprecedented" in our constitutional history (Pet. App. 64a), the district court concluded that, under an abundance of precedent from this Court, those provisions "necessarily constitute punishment" because they single out specific private parties and "prevent[] [them] from engaging in a profession or business" (*id.* at 66a).

The district court specifically rejected the notion that the Special Provisions are permissible because they were a prophylactic measure based on Congress's "predictive determination" about the BOCs' likely conduct if permitted to enter new markets. The court observed that, under this Court's decisions, "[p]unishment is not restricted to past deeds," but "may include deprivations designed to prevent future misconduct." *Id.* at 72a (citing *Brown*, 381 U.S. at 458-59). Indeed, to the district court, the government's central contention that " 'maybe [the BOCs] weren't criminals in the past but we know they will be in the future' " actually "helps make the case for the restrictions being a bill of attainder." *Id.*

2. A divided panel of the Fifth Circuit reversed the district court's judgment. The panel majority suggested that the standard for demonstrating an Attainder Clause violation is a "question of some historical and doctrinal complexity." Pet. App. 14a. In the majority's view, the key to this area of the law is a "subtle analysis" growing

out of *dissents* in the two Nineteenth Century cases (*Cummings* and *Garland*) in which the Court held that preventing private parties from pursuing lawful employment *was* punishment within the meaning of the Attainder Clause. *Id.* at 18a.

According to the Fifth Circuit panel majority, those dissents, as well as subsequent concurring opinions, and majority opinions in cases in which no private party was even singled out for a disability, established a "prophylactic exception" to the Attainder Clause bar. *Id.* at 18a-22a. Under that exception, Congress may explicitly single out specific, and even named, private parties for burdens historically understood to be punishment so long as a reviewing court later determines that Congress enacted such a statute to prevent future misconduct. *See id.* at 29a.

Applying that test here, the majority concluded that Congress passed the Special Provisions not as retribution for the BOCs' supposed prior bad acts, but to prevent those 20 companies from acting unlawfully in the future. In reaching that conclusion, the majority emphasized that the Special Provisions serve the prophylactic purpose of "ensur[ing] fair competition" in certain telecommunications markets by addressing the "substantial risk that the [BOCs] will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors" (*id.* at 32a); that the 1996 Act's legislative history revealed no " 'smoking gun' " establishing punitive intent (*id.* at 33a); and that the Special Provisions were "part of a larger quid pro quo" contained in the 1996 Act (*id.*).

Judge Smith dissented from the majority's attempt to "redefine[] our traditional understanding of the [Attainder Clause's] mandate." *Id.* at 53a. He emphasized that a "prophylactic exception" to the Attainder Clause would eviscerate the important separation of powers protections afforded by that provision. *See id.* at 49a (stressing that,

under the majority's theory, "a statute that sentences to death a named individual who announces that he has criminal tendencies . . . but has yet to commit a crime . . . is not a bill of attainder"). In any event, the majority's creation of such an exception "flatly contradicted" this Court's decisions. *Id.* at 48a (citing *Brown*, 381 U.S. at 458-59). Applying more traditional principles to this case, Judge Smith concluded that the Special Provisions are unlawful because "the unbroken line of Supreme Court precedent" (*id.* at 50a) holds that "bars to employment constitute punishment for purposes of the Bill of Attainder Clause" (*id.* at 42a (citing, among other cases, *Garland, Cummings, Brown,* and *Lovett*)).

REASONS FOR GRANTING THE PETITION

THIS CASE RAISES IMPORTANT QUESTIONS REGARDING THE LIMITS OF CONGRESS'S AUTHORITY IN THE CONTEXT OF AN EXCEPTIONALLY SIGNIFICANT STATUTE.

A. The Court Should Grant Review Because the Fifth Circuit's Analysis Eviscerates a Fundamental Structural Limitation on Congressional Authority.

1. *The Special Provisions Violate the Bill of Attainder Clause.*

A key aspect of our "constitutional equilibrium" is the separation of "the legislative power to make general law" from "the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995); *see id.* at 219 ("The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers."); Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989) ("Executives and judges handle individual cases; the legislature generalizes."). As Justice Story explained, "[t]he first maxim . . . of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept

separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends." 2 J. Story, *Commentaries on the Constitution of the United States* § 521, at 5 n.1 (1833) (internal quotation omitted). *See INS v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J., concurring in the judgment) ("When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.").[5] James Madison similarly declared that legislation imposing disabilities on a named few was "contrary to the first principles of the social compact, and to every principle of sound legislation." *The Federalist* No. 44, at 282 (Rossiter ed. 1961). And Alexander Hamilton warned that, if the legislature may target individual persons, "no man can be safe, nor know when he may be the innocent victim of a prevailing faction." Letter from Phocion (Jan. 1784), *reprinted in* 3 *The Founders' Constitution* 346 (Kurland & Lerner eds. 1987).

The Bill of Attainder Clause reflects the categorical constitutional judgment that Congress is an inappropriate tribunal to decide that particular individuals or entities warrant punishment. The Clause accordingly ensures that, where Congress seeks to impose a disability, it acts *only* by "set[ting] forth a generally applicable rule" governing the conduct of all parties that possess particular traits, not by simply specifying the individual parties that

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5 Law . . . must be not a special rule for a particular person or a particular case, but . . . "the general law . . ." so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, . . . and other similar special, partial, and arbitrary exertions of power under the forms of legislation.

Hurtado v. California, 110 U.S. 516, 535-36 (1884).

it believes should be subject to the disability. *Brown*, 381 U.S. at 450. *See id.* at 454 n.29 (under the Attainder Clause, "a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics"); *Plaut*, 514 U.S. at 241 (Breyer, J., concurring in the judgment) ("[T]he authoritative application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms.").

In accord with these deeply rooted principles, this Court has determined that a federal statute violates the Attainder Clause anytime it (1) "singles out" private parties (2) for "punishment" without a judicial trial. *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846 (1984). The Special Provisions satisfy both criteria.

First, there is no dispute that the "Special Provisions Concerning Bell Operating Companies" single out the BOCs. *See* Pet. App. 64a ("The parties do not, and cannot, dispute that the specification element is met."). That point is plain from the face of the statute. There are more than 1,300 LECs in the United States, but the Special Provisions apply to only 20 such companies, which are identified by name, not by economic or technological characteristics. *See* 47 U.S.C. §§ 153(4), 271-275.

Nor can there be any dispute that excluding individuals or groups from engaging in a particular profession or business constitutes "punishment" under the Bill of Attainder Clause. Indeed, "legislative enactment[s] barring designated individuals or groups from participation in specified employments or vocations" have been a primary focus of the Bill of Attainder Clause. *Nixon*, 433 U.S. at 474. *See also Selective Serv.*, 468 U.S. at 852 ("the list

of punishments forbidden by the Bill of Attainder Clause . . . include[s] legislative bars to participation by individuals or groups in specific employments or professions"); *Brown*, 381 U.S. at 448 (" '[d]isqualification from the pursuits of a lawful avocation' " constitutes punishment) (quoting *Cummings*, 71 U.S. (4 Wall.) at 320); *Lovett*, 328 U.S. at 316 (permanent bar on government employment "is punishment, and of a most severe type"). As long ago as 1867, this Court explained that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. . . . *All* enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder." *Garland*, 71 U.S. (4 Wall.) at 377 (emphasis added).

2. *The Fifth Circuit's Creation of a "Prophylactic Exception" Conflicts With Precedent and Nullifies the Structural Protections Provided by the Attainder Clause.*

Rather than disputing that the kind of restriction imposed by the Special Provisions—preventing the BOCs from pursuing otherwise lawful business opportunities—has historically been understood to fall under the rubric of punishment when imposed on named individuals, the Fifth Circuit created a "prophylactic exception" to the Attainder Clause prohibition. Under that exception, Congress may single out a handful of private parties by name for a restriction that has historically been understood to be "impermissible" (*Nixon*, 433 U.S. at 474), so long as a reviewing court later determines that Congress was motivated not to exact retribution for past transgressions, but to prevent future misdeeds. Pet. App. 19a ("[A] properly crafted prophylactic measure [can] survive attainder analysis, even where the finding of a propensity for future conduct was based solely on past acts, and the result was a bar from future employment.").

The Fifth Circuit's analysis is contrary to this Court's decisions. It is also thoroughly unsound insofar as it replaces a straightforward, historically grounded analysis with a free-wheeling approach based on legislative history that provides no meaningful limit on congressional authority and no certainty in this important area of constitutional adjudication.

a. The Attainder Clause's fundamental structural limitation on congressional power has never depended—and should not depend—on whether a statute that singles out particular parties for abuse was somehow "meant" by Congress as prophylaxis, not retribution. The Framers were thoroughly familiar with supposedly "prophylactic" bills of attainder. Indeed, the anti-Tory attainders passed during the Revolution were frequently justified as preventative. *See* John Hart Ely, Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause,* 72 Yale L.J. 330, 339 (1962) ("historical examples demonstrate that the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future action on the part of the individuals attainted").[6] Having ample firsthand knowledge of such legislative excesses, the Framers acted unanimously to

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[6] For example, the infamous New York loyalty oath requirement of July 3, 1778, recited that it was adopted "more effectually to prevent the mischiefs arising from the influence and example of persons of equivocal and suspected character." Thompson, *Anti-Loyalist Legislation During the American Revolution,* 3 Ill. L. Rev. 147, 153 (1908). More generally, each of the 13 colonies adopted anti-loyalist legislation typically citing allegedly regulatory purposes such as protecting the "public safety." *See, e.g.,* Reppy, *The Spectre of Attainder in New York,* 23 St. John's L. Rev. 1, 22 (1948). The laws were generally "forward-looking" measures that contained loyalty oath exceptions permitting Tories to avoid punishment if they would agree in the future not to support the Crown. *Id.* at 27, 29; *see also* Thompson, *supra,* 3 Ill. L. Rev. at 147, 148, 150, 153, 159, 161. "The fact that many of the statutes were repealed as soon as the war—and therefore the Tory danger—was ended lends credence to the view that their purpose was not primarily retribution for past misdeeds." Ely, *supra,* 72 Yale L.J. at 338 n.66.

ensure that they would never recur. *See* J. Madison, *Debates in the Federal Convention of 1787*, at 449 (Hunt & Scott eds. 1920).

In accord with the Framers' understanding, this Court has consistently rejected the proposition that attainders are permissible so long as they serve a prophylactic purpose. Indeed, the Court has declared that it would be "archaic" to "limit the definition of 'punishment' to 'retribution.'" *Brown*, 381 U.S. at 458. "[L]egislative intent to encourage compliance with the law does not establish that a statute is merely the legitimate regulation of conduct." *Selective Serv.*, 468 U.S. at 851. Thus, "[p]unishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct." *Id.* at 851-52; *see also Nixon*, 433 U.S. at 476 n.40 ("punishment" specifically includes deprivations designed "to prevent . . . future misconduct"); *cf. United States v. Bajakajian*, 118 S. Ct. 2028, 2034 (1998) (holding that forfeiture was a punitive measure under the Excessive Fines Clause even though it could be fully explained in terms of deterrence). After all, "[o]ne of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Brown*, 381 U.S. at 458.

Allowing Congress to avoid the categorical constitutional prohibition on bills of attainder by artful drafting of preambles and committee reports would render the prohibition all but meaningless. Every law that this Court has held to be an unconstitutional attainder could be—and, in fact often was—defended as a rational attempt to prevent against future misconduct. In *Lovett*, for example, the three individuals who Congress precluded by name from government service because of their alleged Communist sympathies were ostensibly barred because their "tendencies made their continued employment dangerous to the national welfare" (*Brown*, 381 U.S. at 460)—just

as in this case the government has asserted that the "tendencies" of the BOCs may be dangerous to future competition. Nevertheless, this Court in *Lovett* had no trouble concluding that the disability imposed on those three named parties was "punishment, and of a most severe type." 328 U.S. at 316. *See also Brown,* 381 U.S. at 456-57 (finding an unlawful attainder despite the government's contention that the law was "enacted for preventive rather than retributive reasons" and "aim[ed] . . . not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events").

b. The Fifth Circuit's new rule is particularly unfortunate because it replaces the clear and historically rooted test that has long been the touchstone of this Court's analysis—and that afforded both Congress and the public the certainty of a categorical rule—with an impressionistic and manipulable inquiry into whether the Legislature as a whole "really" intended to exact retribution or to prevent future harm. From its earliest days, the Court has recognized that determining the intent of a collective legislature is a perilous enterprise. *See, e.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) at 130; *City of Philadelphia v. New Jersey,* 437 U.S. 617, 626 (1978); *Palmer v. Thompson,* 403 U.S. 217, 224-25 (1971).

Undertaking such an inquiry is doubly misguided in this context, where it would be a mechanism for sanctioning a kind of legislation—legislation targeting a closed class of named parties rather than creating a general rule applicable to any party that exhibits certain stated characteristics—for which there is rarely, if ever, a legitimate need. *See Nixon,* 433 U.S. at 486 (Stevens, J., concurring) ("[T]here is rarely any valid reason for such narrow legislation; and normally the Constitution requires Congress to proceed by general rulemaking rather than by

deciding individual cases."); *Plaut*, 514 U.S. at 242-43 (Breyer, J., concurring in the judgment) (emphasizing the "Framers' 'concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person' ") (quoting *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment)).

c. The practical consequences of the Fifth Circuit's novel approach to the Attainder Clause extend far beyond the parties now before this Court. As the American Civil Liberties Union has explained, if this legislation is upheld, "[t]here is simply no valid limiting principle that would prevent Congress from utilizing this tool to target other corporations, other groups, and other individuals in the future." Brief of the San Antonio Chapter of the ACLU as Amicus Curiae at 12 (5th Cir. filed Apr. 21, 1998). Anyone who fell afoul with Congress could be subjected to punishing burdens under the guise of prophylaxis.

In the economic sphere alone, under the Fifth Circuit's decision, Congress would have *carte blanche* to enact legislation that sets out no general rule but rather directs that Microsoft, Philip Morris, or some other victim of popular clamor should be deprived of its rights. All that would be necessary to uphold such a statute would be to convince a court that there was some ostensible prophylactic reason for the legislation. And it would be easy enough to show, for instance, that it was rational to single out Microsoft for restrictions in order to give other companies a fair opportunity to compete in the Internet browser market. Under the Fifth Circuit's analysis, the only limit on Congress's power to impose disabilities on specifically targeted entities without the protections of a judicial trial—precisely the practice this Court has long understood to be "too dangerous to liberty to exist in [a] nation of free men" (*Lovett*, 328 U.S. at 318)—would be the legislative imagination.[7]

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[7] As the ACLU correctly noted, "[t]o approve the Special Provisions, and thereby give sanction to the type of legislation they

On the other hand, adherence to the time-tested rule that Congress may *not* impose historically forbidden punishments on a hand-picked few does not hamstring Congress's ability to enact legitimate regulatory legislation. Congress remains free to impose severe restrictions to protect the Nation's well-being. Where Congress does so, however, it must enact a general rule; it may not impose a punitive restriction only on named parties. In the field of economic regulation, for instance, the Glass-Steagall Act's prohibition on all commercial banks from engaging in investment banking raises no constitutional question. By contrast, no one would reasonably suggest that Congress could lawfully prohibit Bank of America, Citibank, and NationsBank alone and by name from engaging in such activities, however rational such a law might be. *See also Nixon*, 433 U.S. at 485 (Stevens, J., concurring) (even where it is permissible to deprive a class of a benefit, "it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit").

Applied to this case, these principles dictate that Congress was free to enact, as it did, stringent market-opening requirements that it imposed on all 1,300 incumbent LECs. Congress was also free to enact, though it did not, a general rule precluding all incumbent LECs (or some neutrally defined subset thereof) from providing long distance services.[8] But Congress could not lawfully inflict

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exemplify, would also threaten to usher in a new and uniquely vindictive form of interest group politics. . . . [T]he requirement that legislation impose its burdens categorically, and not specifically, serves as a check on manipulation of th[e] legislative process. The prospect that participants in the political process might now seek to impose on their rivals, by name, special disabilities, raises the specter of a uniquely vindictive brand of lobbying effort. This type of law-making simply has no place in our democratic system." ACLU Brief at 14-15.

[8] Apparently, Congress made the judgment that the market-opening requirements in sections 251 and 252 of the Act, as well as numerous other generally applicable regulatory restrictions, were sufficient to permit entry into long distance by all LECs other than

that disability (and the others found in the Special Provisions) only on 20 disfavored companies identified by name, based on a legislative determination that those companies are uniquely likely to behave anticompetitively. *See, e.g., McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 85 (1916) (Holmes, J.). And Congress may not target the BOCs (or any other private parties) by name for such disfavored treatment, *whether or not* one could hypothesize a prophylactic reason to subject only those companies to the disabilities. *See Brown*, 381 U.S. at 449 n.23 ("We think it clear from the Lovett opinion that [the challenged statute] would have been voided even if it could have been demonstrated that no one other than Lovett, Watson and Dodd possessed the characteristics which Congress was trying to reach."). Even if Congress could have fashioned a prophylactic measure, written in generic terms, that would have covered only the BOCs, the fact is that Congress did not do so.[9] It simply designated the BOCs by name. In this context, such constitutional forms matter a great deal.

Accordingly, the Fifth Circuit's suggestion that it was "rational" for Congress to single out the BOCs (Pet. App. 33a), from among 1,300 LECs, because of their "inherent and natural potential to restrain competition" (*id.* at 40a), is particularly offensive to this Court's Attainder Clause jurisprudence. As Judge Sentelle of the

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the BOCs. If the Special Provisions are struck down, these other regulatory restrictions will continue to apply to all LECs, including the BOCs.

[9] It would in fact have been extremely difficult if not impossible to craft a generally applicable rule that would cover the BOCs but no other incumbent LECs. That is true because, among other things, 20 non-BOC LECs were larger (in terms of local telephone lines served) than the smallest BOC (Nevada Bell) at the time the 1996 Act was passed. FCC, *Statistics of Communication Common Carriers, 1995-96*, at 11 (Table 2.1). Even within Nevada, moreover, Nevada Bell has only 28 percent of the lines in the State; Sprint serves many more customers in Nevada, including the State's most important and densely populated urban area, Las Vegas.

D.C. Circuit explained in a similar case, "[i]t is one thing for the legislature to attempt to protect competition by defining a standard against which the conduct of individuals can be measured. It is quite another for it to simply list the names of individuals who Congress perceives as having uncontrollable monopolistic tendencies. This short-circuits the due process protections of trial in an Article III court, and therefore runs afoul of the structural provisions embodied in the Constitution's Bill of Attainder Clause." *BellSouth*, 144 F.3d at 74 (Sentelle, J., dissenting).

d. The Fifth Circuit discerned an imaginary "prophylactic exception" to the Bill of Attainder Clause because it failed to see the difference between a statute that neutrally defines a class and a statute that applies to a few named parties.[10] The panel cited, in support of its prophylatic exception, cases involving statutes that imposed open-ended, generally applicable qualification requirements, without any singling out. *See, e.g., De Veau v. Braisted*, 363 U.S. 144 (1960) (prohibiting all convicted felons from holding certain labor union offices); *Hawker v. New York*, 170 U.S. 189 (1898) (prohibiting felons from practicing medicine); *Dent v. West Virginia*, 129 U.S. 114 (1889) (prohibiting practice of medicine absent certification of medical college attendance or ten years of practice).[11] These cases show only that Congress

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[10] A very similar error is at the heart of the majority opinion in the D.C. Circuit's *BellSouth* case. There, the court of appeals emphasized that section 274, the provision barring BOCs from providing electronic publishing services, was ordinary legislation "apart from its specific targeting aspect." 144 F.3d at 65. As Judge Sentelle properly stressed in dissent there, a bill of attainder analysis that evaluates statutory burdens "apart from [their] specific targeting aspect" is fundamentally misguided. *Id.* at 73. The whole point of the Attainder Clause is to bar Congress from making individualized decisions imposing special burdens on targeted parties.

[11] *See also Brown*, 381 U.S. at 448 n.21 (explaining that statute at issue in *Dent* "set forth general qualifications applicable to all persons who wanted to practice medicine"); *id.* at 460 (explaining

may act prophylactically when it does *not* specifically target its legislation to a closed class of named entities.

The other cases cited by the Fifth Circuit panel majority similarly do not support its holding that Congress may impose a historically recognized punishment on specifically named parties if it acts with a regulatory purpose. In particular, *Nixon*—a decision particularly emphasized by the panel majority—does not bolster that court's conclusion. *Nixon* does not "stand[]" for the proposition that "if legislation has a legitimately nonpunitive function, purpose, and structure, it does not constitute punishment for purposes of the Bill of Attainder Clause, even where it imposes the historically punitive sanction of barring designated individuals from engaging in certain professions." Pet. App. 29a. To begin with, *Nixon* did not involve any sanction at all, much less a "historically punitive" one. Rather, as the Court explained, Congress had specifically provided that President Nixon would receive full compensation for any losses incurred because of the temporary retention of his papers. *Nixon*, 433 U.S. at 475; *see also BellSouth*, 144 F.3d at 73 (Sentelle, J., dissenting) ("[N]ot only did the [*Nixon*] statute fail to inflict any harm previously held to be 'forbidden deprivations,' but its provision for '"just compensation" . . . undercut[] even a colorable contention that the Government has punitively confiscated appellant's property.' ").

Of equal importance, *Nixon* explicitly states that it is flatly "*impermissible*" to impose on a select few burdens that *are* historically recognized to be punitive. 433 U.S. at 474 (emphasis added). Far from supporting the creation of a "prophylactic exception," therefore, *Nixon* affirmed in the clearest possible language that the Constitution imposes a bright-line rule barring Congress from

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that another of the cases cited by the Fifth Circuit majority, *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), "misread" *Lovett* to the extent it thought that *Lovett* "could be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons").

singling out private parties for historically recognized punishments.

To be sure, after determining that the burden imposed on President Nixon did *not* on its face constitute punishment, the Court in *Nixon* went on to consider whether the burden was nevertheless punitive when viewed as a matter of legislative "function" and "motivation." But the Court's explicit purpose in undertaking these additional inquiries was to determine whether the "checklist of deprivations and disabilities" that constitute punishment should be *expanded*, beyond restrictions such as a bar to engaging in a line of business, to include seizure of the President's papers: "Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." *Id.* at 475; *see also Selective Serv.*, 468 U.S. at 853 (undertaking these same additional inquiries "[t]o ensure that the Legislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder"). Thus, as Judge Smith explained in this case, it is "sadly ironic" that the panel majority read these decisions protecting against "congressional creativity in dreaming up new burdens" as authority for *constricting* the Clause's traditional protections. Pet. App. 47a. *See also BellSouth*, 144 F.3d at 73 (Sentelle, J., dissenting) ("[u]nder *Selective Service*, we probably need go no further" than a historical inquiry).[12]

e. Finally, none of the subsidiary arguments relied on by the Fifth Circuit panel majority supports its conclu-

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[12] Not surprisingly, the Fifth Circuit's misunderstanding on this point conflicts with the statements of other courts of appeals. *See Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1263 (3d Cir. 1996) (Becker, J.) ("[E]ven if some remedial purpose can fully explain the measure," a law is punitive if "a historical analysis show[s] that the measure has traditionally been regarded as punishment"); *Crain v. City of Mountain Home*, 611 F.2d 726, 729 (8th Cir. 1979) (invalidating as bill of attainder an ordinance reducing city attorney's pay to $1 per year).

sion that the Special Provisions can survive scrutiny under the Attainder Clause.

The panel majority explained that "perhaps [the] foremost" reason it believed the Special Provisions were prophylactic was that they did not "impose a perpetual bar." Pet. App. 31a. But not every sentence is a life sentence. This Court has stated unequivocally that "legislative punishment, of *any* form or severity, of specifically designated persons or groups" (*Brown*, 381 U.S. at 447 (emphasis added)) is barred by the Attainder Clause.

Nor does the possibility that the FCC might someday release the BOCs from two of the restrictions—those in sections 271 and 273—save them from being a bill of attainder. This Court has never suggested that a statute is rendered "nonpunitive" if the legislature allows a private party to bring the punishment to an end by complying with conditions imposed by the statute—especially when, as here, the conditions are themselves onerous and indefinite. *See Cummings*, 71 U.S. (4 Wall.) at 324 (statutes that "inflict punishment . . . conditionally," such as a law under which a defendant could avoid punishment by doing "a given act by a named day," " 'come[] precisely within the definition of a bill of attainder' "); Pet. App. 44a (Smith, J., dissenting) ("[T]he Bill of Attainder Clause cannot be avoided simply by inserting into the statute a means of escape. The fact that the federal government holds the key to the [BOCs'] prison is irrelevant.") (citing *Brown*).

Similarly, the Special Provisions do not become constitutional because they were part of a "larger quid pro quo" in the 1996 Act. Pet. App. 33a. First, it is wrong to suggest that the BOCs "asked for" the Special Provisions as a replacement for the AT&T Consent Decree restrictions. SBC repeatedly presented testimony demonstrating that a statutory provision singling out the BOCs for special restrictions would be a bill of attainder and

violate the separation of powers.[13] In any event, as a matter of law, the fact that "a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation." *New York v. United States*, 505 U.S. 144, 183 (1992).

Nor can the Fifth Circuit's judgment be defended on the related ground that the BOCs are somehow "better off" under the Special Provisions than under the AT&T Consent Decree. On the contrary, the fact that the Special Provisions readjudicate matters that had already been litigated and consensually resolved in the federal courts simply demonstrates how far Congress has gone here in usurping the judicial role—and violating the separation of powers.

Congress may relieve named parties of judicially imposed burdens, such as those resulting from an injunction running in favor of the government. *See Plaut*, 514 U.S. at 230-31; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 432 (1856). Congress may also change substantive background law. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992); *Wheeling*, 59 U.S. (18 How.) at 429. But basic separation of powers principles prevent Congress from substituting for the judgment of an Article III court a statute on the very same subject imposing superseding restrictions aimed exclusively and specifically at the parties to the litigation. *See Plaut*, 514 U.S. at 223 (separation of powers protects "suits depending or adjudged"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 & n.13 (1869).

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[13] H.R. Rep. No. 102-850, at 88-94 (1992). Similar testimony was presented by the ACLU. *See* Letter from Morton H. Halperin, Director, ACLU, to the Hon. Jack Brooks, Chairman, House Judiciary Committee, at 3-4 (June 29, 1992). *See also Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong., 1st Sess. 30 (1995) (statement of Edward Whitacre, Chairman of SBC Communications Inc.) (Special Provisions are "wrong, anticompetitive, counterproductive, and anti-consumer").

Moreover, this Court has never suggested that the existence of collateral benefits can somehow nullify the fact that a particular statutory provision constitutes punishment under the Attainder Clause. Indeed, determining whether, on balance, the benefits conferred by some parts of a statute outweigh the punishments imposed by others would involve comparing incommensurables in a process akin to "judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Any such analysis is particularly inappropriate in this context, where it would require the Court to determine whether the future rulings of the particular federal judge who was supervising the AT&T Consent Decree were likely to be more favorable to the BOCs than future rulings of the FCC under the new statutory provisions. Such an analysis is neither possible nor appropriate, and could not in any event save a statute that reimposes two disabilities (those involving electronic publishing and alarm monitoring) that the judiciary had already lifted, that permanently bars the named companies from manufacturing joint ventures, and that indefinitely subjects those companies to the onerous requirements of section 271 before they may obtain long distance authority (authority which can then be revoked at any time, *see* 47 U.S.C. § 271(d)(6)).

B. The Court Should Review This Case To Alleviate the Courts of Appeals' Admitted Confusion as to the Appropriate Bill of Attainder Test Under This Court's Precedents.

As significant as the Fifth Circuit's error in creating a "prophylactic exception" to the Attainder Clause bar is the fact that the court itself was frankly unsure of that ruling.

The panel majority made no secret of the difficulties it experienced in determining the appropriate rule under the Attainder Clause. Judge Jolly, writing for the two-

judge majority, lamented that, "[l]ike a Christmas pie," this Court's opinions "provide a little something for every taste." Pet. App. 41a n.30. He described the panel's analysis as a "sinuous journey" through what the majority understood to be the "diverse expressions and applications" of the Attainder Clause in this Court's cases. *Id.* Indeed, to reach its result, the majority was forced to cast aside one of this Court's major precedents (*Brown*) as "aberrant" (Pet. App. 29a) and to dismiss rigorous adherence to the language of others as "unsensible" and "ritualistic" (*id.* at 30a). The uncertainty reflected on the face of the majority opinion below is reinforced by the fact that federal judges are almost evenly split as to whether this Court's precedents require invalidation of the Special Provisions. Four judges—the majorities in this case and in the D.C. Circuit's *BellSouth* decision—believe that the Special Provisions are constitutional; three judges—the dissenters in both cases and the district judge here—have concluded that the Special Provisions are invalid.[14]

While confusion among the lower courts about the import of this Court's decisions is always undesirable, it is intolerable where, as here, the confusion relates to an issue of foundational importance in our constitutional system. No question faced by the federal courts—and Congress—is more fundamental than where the power of one Branch ends and the authority of another begins. Yet the federal judiciary is plainly unsure of the answers to basic

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[14] As noted above, the D.C. Circuit decision is limited to the constitutionality of the electronic publishing restriction in section 274. Petitions for rehearing are pending in that case. The D.C. Circuit also held argument on September 25, 1998, in a separate case concerning the constitutionality of the long distance restriction in section 271. *See BellSouth Corp. v. FCC*, No. 98-1019 (D.C. Cir.). If the D.C. Circuit ultimately determines that either of those restrictions violates the Attainder Clause, that will provide an important additional reason to grant review in this case. It should be noted that this case involves the validity of sectons 271-275, whereas the D.C. Circuit cases raise the validity of sections 274 and 271, respectively.

questions about the limits imposed by the Attainder Clause, such as whether Congress is free to single out private parties for disabilities if it has a prophylactic purpose. That fact alone warrants immediate consideration of this issue by the Court, to ensure stability and provide predictability to officials in all Branches of our government. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (reviewing question regarding the scope of congressional authority to enact a specific kind of statute even though the courts of appeals were in agreement on that point); *cf. Clinton v. City of New York*, 118 S. Ct. 2091, 2108-09 (1998) (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment.").

C. The Court Should Review This Case Because the Constitutionality of the Special Provisions Is a Matter of Pressing National Importance in Itself.

It is common ground here that the 1996 Act is "an unusually important legislative enactment." *Reno v. ACLU*, 117 S. Ct. 2329, 2337 (1997). Indeed, both the government and the long distance incumbents (who seek, by defending the Special Provisions, to protect against BOC competition in their markets) have repeatedly trumpeted the unique and overriding significance of this statute. As many of those parties jointly told the Court in seeking certiorari in *Iowa Utilities Board*, the 1996 Act is "landmark" legislation that "overhaul[s]" the regulatory scheme governing the telephone networks that "affect every home and business in the United States and are critical to the national economy." Petition for a Writ of Certiorari at 1, 11, *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826 (filed Nov. 17, 1997); *accord* Petition for a Writ of Certiorari at 3, *FCC v. Iowa Utils. Bd.*, No. 97-831 (filed Nov. 19, 1997). By granting review as to *every* issue presented by both the petitioners and the cross-petitioners in that case, this Court recognized the importance of even the seemingly routine administrative law

and statutory interpretation questions that have arisen in the context of this major enactment.

The question presented here is even more fundamental —both legally and practically—than those the Court agreed to decide in *Iowa Utilities Board*. The basic constitutional question whether Congress had the authority to enact the Special Provisions is, to say the least, a substantial one, as demonstrated by the split of opinion among the judges that have reviewed this case. And the practical import of that question is enormous. Under section 271, BOCs may not provide long distance services originating in an "in-region" State until they receive FCC approval. Proceedings under section 271 are currently on-going for virtually every State. To date, however, the FCC has rejected every single section 271 application, despite the Commission's frank acknowledgement that such relief would have enormous economic benefits for hundreds of millions of American consumers who are currently deprived of the competition that some of America's best-managed and largest telecommunications companies can bring to these important markets. By the estimate of one respected economist, BOC entry into the currently oligopolistic long distance market would result in consumer gains of as much as "$24 billion annually or $300 billion in present value." [15]

In sum, this case poses a legal question of the first order in the context of a highly important statute that sets national policy in the exploding telecommunications field into the next millennium. It merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[15] Paul W. MacAvoy, *The Failure of Antitrust and Regulation To Establish Competition in Long-Distance Telephone Services* 185-86 (1996). Before the Fifth Circuit, five States filed an amicus brief detailing how "[t]he Special Provisions hinder competition and harm consumers." Amicus Curiae Brief of Texas, Arkansas, Mississippi, South Carolina, and South Dakota at 4 (5th Cir. filed Apr. 21, 1998).

Respectfully submitted,

WILLIAM T. LAKE
JOHN H. HARWOOD II
DAVID G. GRAY
SAMIR C. JAIN
WILMER, CUTLER & PICKERING
2445 M St., NW
Washington, D.C. 20037
(202) 663-6000

MARK D. ROELLIG
DAN L. POOLE
ROBERT B. MCKENNA
U S WEST, INC.
1801 California St.
51st Floor
Denver, CO 80202
Counsel for U S WEST, Inc.

MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K St., NW, Suite 1000W
Washington, D.C. 20005
(202) 326-7900
Counsel for SBC entities

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

WALTER E. DELLINGER
O'MELVENY & MYERS
555 13th St., NW, Suite 500W
Washington, D.C. 20004
(202) 383-5300

DONALD L. FLEXNER
JOHN I. STEWART, JR.
CLIFTON S. ELGARTEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 624-2500

JAMES D. ELLIS
LIAM S. COONAN
MARTIN E. GRAMBOW
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, TX 78205
Counsel for SBC entities

APPENDIX A

Revised September 23, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-10140

SBC COMMUNICATIONS, INC.; SOUTHWESTERN BELL TELEPHONE COMPANY; SOUTHWESTERN BELL COMMUNICATIONS SERVICES, INC.; SOUTHWESTERN BELL COMMUNICATIONS SERVICES-TEXAS, INC.; SOUTHWESTERN BELL INTERNET SERVICES, INC.; PACIFIC BELL; PACIFIC BELL COMMUNICATIONS; NEVADA BELL,
Plaintiffs-Appellees,

US WEST COMMUNICATIONS, INC.;
BELL ATLANTIC CORPORATION,
Intervenor Plaintiffs-Appellees,

versus

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Defendants-Appellees-Appellants,

MCI TELECOMMUNICATIONS CORPORATION; AMERICAN TELEPHONE & TELEGRAPH CORPORATION; ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES; COMPETITIVE TELECOMMUNICATIONS ASSOCIATION; NATIONAL CABLE TELEVISION ASSOCIATION; SPRINT COMMUNICATIONS COMPANY L P; TELECOMMUNICATIONS RESELLERS ASSOCIATION,
Intervenor Defendants-Appellees-Appellants,

versus

KEITH MAYDAK,
Movant-Appellant.

Appeals from the United States District Court for the Northern District of Texas

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September 4, 1998

Before JOLLY, SMITH, and BARKSDALE, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal challenges the constitutionality of a significant part of the Telecommunications Act of 1996. The FCC, the United States, and numerous interested intervenors appeal the district court's determination that §§ 271-75 of the Act, 47 U.S.C. §§ 271-75, are an unconstitutional bill of attainder. Finding the provisions at issue to be nonpunitive in character, we hold that they are not, in fact, a bill of attainder as that term has been defined by the Supreme Court. Because we further hold that the provisions are also consistent with the constitutional requirements of separation of powers, equal protection, and free speech, we reverse the judgment of the district court.

I

As every antitrust law student learns these days, in 1974 the Department of Justice brought a massive, precedent-setting Sherman Act[1] suit against AT&T. *See United States v. AT&T*, 461 F. Supp. 1314 (D.D.C. 1978). For many years before the suit, most telecommunications equipment and telephone service in the United States—both local and "long distance"—had been provided by AT&T and its corporate affiliates, collectively known as the Bell System. *See United States v. AT&T*, 552 F.Supp. 131, 222 (D.D.C. 1982). Although certain

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[1] 15 U.S.C. § 1 et seq.

isolated aspects of the Bell System had become the subject of intermittent antitrust actions, consent decrees, and federal legislative intervention dating back to 1949, *see generally United States v. AT&T*, 552 F.Supp. at 135-38, no broad-based attack on the system itself had ever been launched. In 1974, however, the government changed all that. It alleged, among other things, that the way AT&T used its various state-granted local service monopolies to also monopolize the markets in long distance service and telecommunications equipment was in contravention of § 2 of the Sherman Act. *See United States v. AT&T*, 461 F. Supp. at 1317-18. AT&T ultimately conceded this assessment, for, after some initial procedural wrangling, it eventually settled with the government in what became known as the AT&T Consent Decree or Modified Final Judgment ("MFJ"). *See United States v. AT&T*, 552 F.Supp. at 222-234, *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Under the MFJ, AT&T was required to divest itself of its twenty-two local exchange subsidiaries, which became known as the Bell Operating Companies or "BOCs." 552 F.Supp. at 223.[2]

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[2] As District Judge Greene explained the divestiture:

> The key to the Bell System's power to impede competition has been its control of local telephone service. The local telephone network functions as the gateway to individual telephone subscribers. It must be used by long-distance carriers seeking to connect one caller to another. Customers will only purchase equipment which can readily be connected to the local network through the telephone outlets in their homes and offices. The enormous cost of the wires, cables, switches, and other transmission facilities which comprise that network has completely insulated it from competition. Thus, access to AT&T's local network is crucial if long distance carriers and equipment manufacturers are to be viable competitors.
>
> AT&T has allegedly used its control of this local monopoly to disadvantage these competitors in two principal ways. First, it has attempted to prevent competing long distance carriers and competing equipment manufacturers from gaining access to the local network, or to delay that access, thus placing them

The BOCs were then grouped into seven "regional Operating Companies" or "RBOCs." 552 F.Supp. at 142 n.41. In addition, because the BOCs were allowed to retain their state-regulated local service monopolies under the terms of the MFJ, they became subject to various restrictions on their own lines of business. In particular, the BOCs were barred from competing in the markets for long distance,[3] telecommunications equipment,

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in an inferior position vis-a-vis AT&T's own services. Second, it has supposedly used profits earned from the monopoly local telephone operations to subsidize its long distance and equipment businesses in which it was competing with others.

For a great many years, the Federal Communications Commission has struggled, largely without success, to stop practices of this type through the regulatory tools at its command. A lawsuit the Department of Justice brought in 1949 to curb similar practices ended in an ineffectual consent decree. Some other remedy is plainly required; hence the divestiture of the local Operating Companies from the Bell System. This divestiture will sever the relationship between this local monopoly and the other, competitive segments of AT&T, and it will thus ensure—certainly better than any other type of relief—that the practices which allegedly have lain heavy on the telecommunications industry will not recur.

552 F.Supp. at 223.

[3] By "long distance," we refer to what is technically known as "interLATA" service. In implementing the MFJ, the district court established numerous local access and transport areas or "LATAs" within which the BOCs were permitted to operate and provide telephone service. *See United States v. West. Elec. Co.*, 569 F.Supp. 990, 993-94 (D.D.C. 1983). The way the long distance line-of-business restriction played out, each BOC was allowed to transmit telecommunications information only between points within a single LATA, providing what is, basically, the traditional local telephone service, even though every BOC encompassed several LATA's as a geographical matter. When a person in one LATA called a person in another, the BOC serving the caller's LATA was required to transmit the call to an interexchange carrier, such as AT&T or MCI, which then carried the call on its own network across the LATA boundaries, whereupon it was picked up by the BOC (pos-

and information services (including electronic publishing and alarm monitoring). 552 F.Supp. at 224.[4] The restriction on information services was subsequently lifted, *see United States v. West. Elec. Co.*, 767 F.Supp. 308 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993), but the BOCs then became subject to detailed FCC regulations governing the provision of information and other "enhanced" services. *See generally In re Computer III Further Remand Provisions: Bell Operating Company Provision of Enhanced Services*, 10 F.C.C.R. 8360 (1995).

As the very existence of the numerous and ponderous post-1982 decisions of the D.C. courts should make clear,

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sibly the same one) that served the called party's LATA. *See United States v. West. Elec. Co.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992). This is "long distance" service. Local, or "intraLATA" service, on the other hand, is the making of calls entirely within a single LATA, even though such calls are sometimes subject to per-minute tolls.

[4] Again, as Judge Greene explained:

> After the divestiture, the Operating Companies will possess a monopoly over local telephone service. According to the Department of Justice, the Operating Companies must be barred from entering all competitive markets to ensure that they will not misuse their monopoly power. The Court will not impose restrictions simply for the sake of theoretical consistency. Restrictions must be based on an assessment of the realistic circumstances of the relevant markets, including the Operating Companies' ability to engage in anticompetitive behavior, their potential contribution to the market as an added competitor for AT&T, as well as upon the effects of the restrictions on the rates for local telephone service. This standard requires that the Operating Companies be prohibited from providing long distance services and information services, and from manufacturing equipment used in the telecommunications industry. Participation in these fields carries with it a substantial risk that the Operating Companies will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors.

552 F.Supp. at 224.

however, the MFJ was far from a final resolution of the nation's telecommunications dilemma. Its enforcement and alteration in the light of technological progress and changing market circumstances ultimately required substantial monitoring on the part of the district court, and the extensive judicial tinkering that resulted prompted many pundits to dub District Judge Greene the country's "telecommunication's czar."[5] Unsurprisingly, Congress soon became skeptical of this unusual title of judicial nobility,[6] and ultimately spent many long and contentious

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[5] *See* Fred H. Cate, *The National Information Infrastructure-Policymaking and Policymakers*, 6 Stan. L. & Pol'y Rev. 43, 50 (1994) (noting that, although "Judge Greene rendered his decision approving the Modified Final Judgment in 1982," he "retained jurisdiction under the consent decree to control the operations of both AT&T and the [RBOCs]" and "the breadth of that decree and the substantial discretion given judges to interpret antitrust laws, 'probably makes him the single most powerful decisionmaker in U.S. communications policy today,' " a veritable " 'telecom czar' ") (quoting Mark S. Nadel, *U.S. Communications Policymaking: Who & Where*, 13 Hastings Comm. & Ent. L. J. 273, 289 (1991) and *Telcom Showdown: Battle Lines Harden as Baby Bells Fight to Kill Restrictions*, Wall St. J., July 22, 1994, at A1, respectively); *see also* Michael Schrage, *Is There a Shade of Greene In the Microsoft Decision?*, Wash. Post, Feb. 17, 1995, at B3 ("Judge Greene has been alternatively praised and excoriated as a 'telecommunications czar' whose impact on telecommunications is still more forceful than that of AT&T Chairman Robert Allen or Tele-Communications Inc. boss John Malone."); Editorial, *Review & Outlook: State of the Presidency*, Wall St. J., Feb. 2, 1990, at A14 ("Judge Greene made himself Telecommunications Czar as part of the AT&T breakup; maybe he'd now like to take over running Lebanon."); Paula Dwyer, *The Baby Bells: Ready, Get Set, Diversify*, 2962 Bus. Wk. 29 (1986) (noting that a 1986 D.C. Circuit ruling was "the latest blow to Judge Greene, who, as czar of the breakup of AT&T, is the 'dominant influence on the industry,' according to William L. Weiss, chairman and chief executive of Ameritech," and remarking, presciently, that "Greene's clout and influence are already under attack on Capitol Hill, where lawmakers are pushing legislation to return supervision of the Baby Bells to the FCC").

[6] *Cf.* U.S. Const., Art. I, sec. 9, cl. 8.

years in drafting a system of comprehensive telecommunications regulation to replace and supplement the MFJ. *See SBC Communications, Inc. v. FCC*, 138 F.3d 410, 412-13 (D.C. Cir. 1998). On February 8, 1996, President Clinton executed these legislative labors into law as the Telecommunications Act of 1996 (the "Act").

As has been widely recognized, the core function of the Act is to " 'provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition.' " *SBC Communications*, 138 F.3d at 413 (quoting H.R. Conf. Rep. No. 104-458, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 124). To effectuate this goal, the Act prohibits states and localities from sanctioning local service monopolies or " 'prohibiting the ability of any entity to provide . . . intrastate telecommunications service.' " *Id.* (quoting 47 U.S.C. § 253(a)). It also places numerous and onerous duties and restrictions on all local telephone service providers ("Local Exchange Carriers," or "LECs")[7] that are designed to prevent a recurrence of the uncompetitive use of local service market power that occurred under the Bell System. *See id.*; 47 U.S.C. §§ 251-52.

In addition to these generally applicable local competition provisions, however, the Act also contains a number of provisions directed specifically at the BOCs. First, the uncodified § 601(a)(1) provides that the restrictions imposed by the MFJ are lifted and replaced by the restrictions of the Act. *See* Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 143 (1996); *cf. United States v. West. Elec. Co.*, 1996 WL 255904 (D.D.C. Apr. 11, 1996) (terminating the MFJ in accordance with § 601(a)(1)). Second, §§ 271-76, entitled "Special Provisions Concern-

[7] Of which there are now many hundreds of independent examples (e.g., GTE Corp., Sprint Communications Company, Southern New England Telephone Company, etc.) in addition to the BOCs.

ing Bell Operating Companies," imposed renewed line-of-business restrictions on the activities of the twenty remaining BOCs; § 153(4) of the Act makes quite clear that the additional restrictions are only applicable to these twenty specific, named corporations. *See* 47 U.S.C. §§ 153(4) & 271-76. It is these latter "Special Provisions" that are at the heart of this case, and they must accordingly be examined in some detail.[8]

Inconvenient to that purpose, the Special Provisions are drafted in that rather soulless bureaucratese that is an all too familiar sight on the American legal landscape. We have attempted to pierce the statutory fog, however, and would summarize the Special Provisions' effect essentially as follows.

First, under § 271, each BOC must obtain prior authorization from the FCC before providing non-incidental long distance service to customers within the states in which the BOC was allowed to provide local service prior to the enactment of the Act ("in-region long distance service"). 47 U.S.C. § 271(a) & (b). The FCC is to grant authorization only after a number of complex criteria evidencing free competition in the particular local service market have been established. 47 U.S.C. § 271 (d)(3); *see generally SBC Communications,* 138 F.3d at 413-14. Even then, however, the BOC in question may initially only provide long distance service through a separate affiliate. 47 U.S.C. §§ 271(d)(3)(B) & 272 (f)(1). The BOCs are permitted to provide incidental long distance service and long distance service to customers located outside of their regions of former monopoly ("out-of-region long distance service") without significant limitation or prior authorization. 47 U.S.C. § 271(b) (2) & (3).

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[8] With the exception of § 276, relating to payphone service, which has not been challenged.

Second, under § 273, the BOCs may not manufacture or provide telecommunications equipment until they have met the requirements for non-incidental, in-region long distance service in § 271(d), and, once again, even then only through a separate affiliate for an interim period. 47 U.S.C. §§ 272(f)(1) & 273(a).

Finally, under §§ 274 & 275, the BOCs may not provide electronic publishing or alarm monitoring services until February 8, 2001, unless they do so by way of separate affiliate or joint venture and, in the case of alarm monitoring, only if they were engaged in the business prior to November 30, 1995. 47 U.S.C. §§ 274(a), 274(g)(2), & 275(a).

Essentially, the Special Provisions recreate most of the original line-of-business prohibitions of the MFJ, with some tweaking. In the case of information services, the recreation represents a reimposition of restrictions that had already been lifted under the regime of the MFJ. In the case of in-region long distance service and telecommunications equipment, however, the Act simply changes the administrator and specifies the rules by which Judge Greene's long-running restrictions can be lifted.

II

On April 11, 1997, plaintiff SBC Communications, which is of course one of the RBOCs,[9] applied to the FCC pursuant to § 271 to have the long distance line-of-business restriction lifted for its local service area of Oklahoma. The FCC determined that the statutory criteria had not been met, and therefore denied the application on

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[9] SBC is currently parent to BOCs Southwestern Bell, Pacific Bell, and Nevada Bell, and will become parent to Illinois Bell, Indiana Bell, Wisconsin Bell, Michigan Bell, and Ohio Bell upon completion of its planned merger with Ameritech, another RBOC. Southwestern Bell provides local services to customers in Texas, Missouri, Oklahoma, Arkansas, and Kansas. Pacific Bell serves California.

June 26, 1997. SBC appealed that ruling to the D.C. Circuit, where it was affirmed on March 20, 1998. *See SBC Communications,* 138 F.3d at 410.

Without waiting for the outcome of that appeal, however, on July 2, 1997, SBC and its subsidiaries filed suit against the United States and the FCC in the Federal District Court for the Northern District of Texas, alleging that all of the Special Provisions were facially unconstitutional under the Bill of Attainder and Equal Protection Clauses, and that § 274 violated the Free Speech Clause as well. Several long distance companies, including MCI Telecommunications Corp., Sprint Communications Company, and AT&T, the BOCs' erstwhile parent, intervened on the government's side in the dispute, and two other RBOCs, US West Communications and Bell Atlantic Corp., intervened on SBC's. Bell Atlantic added a slightly more nuanced separation of powers challenge to SBC's other constitutional complaints.

On December 31, 1997, ruling on cross-motions for summary judgment, District Judge Kendall held that the Special Provisions constituted an unconstitutional bill of attainder and that they were severable from the rest of the Act. He therefore granted SBC's motion and declared the challenged sections void. From this final judgment the United States, the FCC, and the defendant-intervenors timely appeal.

III

This court reviews the constitutionality of a federal statute de novo. *United States v. Bailey,* 115 F.3d 1222, 1225 (5th Cir. 1997).

IV

On appeal, SBC and the other appellees urge all of the arguments offered below as potential bases for affirming some or all of the decision of the district court. We consider each contention in turn, beginning with SBC's pri-

mary and most substantial complaint that the Special Provisions constitute a bill of attainder.

A

Article I, sec. 9, cl. 3 of the United States Constitution provides that "[n]o Bill of Attainder or ex post facto law shall be passed [by Congress]." [10] As the Supreme Court has often clarified, "[i]n forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial 'specifically designated persons or groups.' " *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984) (quoting *United States v. Brown*, 381 U.S. 437, 447 (1965)). Consistent with this characterization, the Court has generally defined a bill of attainder as " 'a law that legislatively determines guilt and inflicts punishment upon an identified individual without provision of the protections of a judicial trial.' " *Id.* (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977)). Where, as here, the liability in question clearly attaches by operation of the legislative act alone, the constitutional test may be summarized in the following two-pronged test: First, has the legislature acted with specificity? Second, has it imposed punishment?

In this case, SBC argues that the Special Provisions constitute a bill of attainder because they impose line-of-business restrictions on named corporations. As SBC portrays the Special Provisions, they represent Congress's unconstitutional legislative determination that the BOCs are the guilty spawn of AT&T, who deserve to be deprived of their current ability to enter the long distance, information services, and the telecommunications equipment markets as punishment for the immutable past anti-

[10] Art. I, sec. 10, cl. 1 contains a parallel provision applicable to the states.

trust violations of their former parent. The district court essentially agreed with this analysis.

Notwithstanding beguiling arguments that support the district court's holding, at bottom, we simply cannot find a constitutional violation in this case. Even assuming that the Bill of Attainder Clause applies to corporations,[11] and even assuming that the Special Provisions are sufficient to meet the specificity prong of the test,[12] there

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[11] Which does seem likely. Although the Court has yet to reach the question directly, it has suggested as much in dictum. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (indicating that the Clause applies to laws that punish "a single individual or *firm*") (emphasis added). Furthermore, it has been established that a number of very similar constitutional rights do apply in the corporate setting. *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (freedom of speech); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (double jeopardy); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (takings); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (searches and seizures); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984) (due process); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (equal protection).

[12] Again, probably a safe assumption in this case, as the Special Provisions identify the burdened parties by name. In the entirety of the Supreme Court's attainder jurisprudence, the only case to suggest that a statute naming individuals might not satisfy the specificity prong of the test was the very unusual *Nixon*. There, the Court indicated that a law requiring Richard M. Nixon by name to turn over his presidential papers to the Administrator of General Services might not be specific enough to constitute a bill of attainder, because, as the only former president whose papers were not protected in a presidential library, Nixon represented a "legitimate class of one" for purposes of such legislation. *Id.*, 433 U.S. at 472. That unusual case seems inapposite to the one at hand, particularly in the light of the fact that the rest of the Court's attainder jurisprudence, both subsequent and prior, has consistently applied a broad interpretation of specificity. *See, e.g., Selected Service*, 468 U.S. at 847 (noting that " '[t]he singling out of an individual for legislatively imposed punishment constitutes an attainder whether the individual is called by name or described in

simply cannot be a bill of attainder unless it is also the case that the Special Provisions impose punishment on the BOCs. As Justice Scalia recently reiterated in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995):

> The premise that there is something wrong with particularized legislation is of course questionable. While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely "singling out" but also punishment, and a case which says that Congress may legislate "a legitimate class of one."

Id. at 239 n.9 (citing *United States v. Lovett*, 328 U.S. 303, 315-18 (1946), and *Nixon*, 433 U.S. at 472, for the two final propositions); *see also Selective Service*, 468 U.S. at 851 (stating expressly that "[e]ven if the specifi-

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terms of conduct which, because it is past conduct, operates only as a designation of particular persons' ") (quoting *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 86 (1961)); *United States v. Brown*, 381 U.S. 437 (1965) (finding law applicable to past members of the Communist Party specific enough to constitute an attainder); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (noting that, although "bills [of attainder] are generally directed against individuals by name," they "may also be directed against a whole class," as "[t]he bill against the Earl of Kildare and others, passed in the reign of Henry VIII," which "enacted that 'all such persons which be or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said late earl,' and certain other parties, who were named, 'in his or their false and traitorous acts and purposes, shall in likewise stand, and be attainted, adjudged, and convicted of high treason' ") (quoting 28 Hen. VIII, c. 3 (1536)).

city element were deemed satisfied," the provision at issue "would not necessarily implicate the Bill of Attainder Clause," because "[t]he proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group").[13] Because punishment is a necessary element of an unconstitutional bill of attainder, and because we can find in the Special Provisions no punishment—as that term must be defined in the context of this case—our resolution of that question is dispositive of the attainder claim.

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As an initial matter, however, we must acknowledge that just what constitutes "punishment" for purposes of the Bill of Attainder Clause is a question of some historical and doctrinal complexity. In particular, the distinction between the punitive and the prophylactically regulatory, which is of course at the root of this case, is admittedly a fine one.

Under the common law, there were no such nuances: the very concept of "attainder" was clearly limited to criminal cases of a capital nature. As Blackstone described it:

> When sentence of death, the most terrible and highest judgment in the laws of England, is pro-

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[13] *See also BellSouth Corp. v. FCC*, 144 F.3d 58, 63-64 (D.C. Cir. 1998) (finding punishment a necessary condition of a bill of attainder, regardless of specificity, in rejecting an attack on § 274 of the Special Provisions at issue in this case); *Dehainaut v. Peña*, 32 F.3d 1066, 1071 (7th Cir. 1994) (same with regard to a provision imposing a perpetual employment bar on the air traffic controllers fired by President Reagan); *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 727 (9th Cir. 1992) (same with regard to a law affecting certain named firearms (and thus their manufacturers)); *but see BellSouth*, 144 F.3d at 72 (Sentelle, J., dissenting) (noting that, although "mere specificity may not make an act a bill of attainder," in "most cases the Court has required little more").

> nounced, the immediate inseparable consequence by the common law is *attainder*. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of it's [sic] protection, and takes no farther care of him than barely to see him executed. He is then called attaint, *attinctus*, stained, or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law. . . . The consequences of attainder are forfeiture, and corruption of blood.

4 William Blackstone, *Commentaries* *373-74 (citing 3 Inst. 213).[14] Tough stuff. Nevertheless, and consistent with this definition, common law bills of attainder were "such special acts of the legislature, as inflict[ed] capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings."[15]

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[14] As Blackstone further clarified:

> [W]hen judgment is once pronounced, both law and fact conspire to prove [the attainted person] completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.

Id.

[15] For example, the 1685 attainder of James, Duke of Monmouth:

> WHEREAS James Duke of Monmouth has in an hostile manner invaded this kingdom and is now in open rebellion, levying war against the king, contrary to the duty of allegiance; Be by

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1338 at 209 (Boston 1833). A similar act that inflicted "a milder degree of punishment than death" was termed a "bill of pains and penalties." *Id.* at 209-10.

Although some of the Supreme Court's earliest opinions appeared to recognize that attainder was technically confined to capital cases,[16] its subsequent jurisprudence has uniformly supported a broader sweep for the constitutional prohibition. *See, e.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 138 (1810) (Marshall, J.) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."); *Cummings,* 71 U.S. at 323 ("Within the meaning of the Constitution, bills of attainder include bills of pains and penalties."); *Lovett,* 328 U.S. at 314 (" 'A bill of attainder is a legislative act which inflicts punishment without a judicial trial.' ") (quoting *Cummings,* 71 U.S. at 323); *Brown,* 381 U.S. at 447 (noting that "the Bill of Attainder Clause [i]s not to be given a narrow historical reading (which would exclude bills of pains and penalties), but [i]s in-

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and with the advice and consent of the lords spiritual and temporal, and commons in this parliament assembled, and by the authority of same, That the said James Duke of Monmouth stand and be convicted and attainted of high treason, and that he suffer pains of death, and incur all forfeitures as a traitor convicted and attainted of high treason.

1 Jac. II, c. 2 (1685), *quoted in Nixon,* 433 U.S. at 473 n.35.

16 *See, e.g., Calder v. Bull,* 3 U.S. (3 Dall.) 386, 389 (1798) (noting that "the Parliament of Great Britain claimed and exercised a power to pass [ex post facto] laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less, punishment"); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 179 (1803) (Marshall, J.) ("The constitution declares that 'no bill of attainder or ex post facto law shall be passed.' If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?").

stead to be read in light of the evil the Framers . . . sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups"); *cf.* 3 Story, *Commentaries* § 1338 at 210 ("But in the sense of the constitution, it seems, that bills of attainder include bills of pains and penalties.") (citing *Fletcher*).[17] Apart from making clear that the Clause reaches punishment of a lesser severity than the death penalty, however, these general statements provide little assistance to our present inquiry.

More guidance is found by considering the details of the Court's development of the punishment prong. In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), and its companion case, *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866), Justice Field considered whether laws requiring that persons swear an oath under penalty

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[17] Although our information is somewhat limited, *see* Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 Va. L. Rev. 475, 477 (1984) (stating that "[t]here is no record of any debate about including a ban on the bills in the Constitution," and that the provision "is scarcely mentioned by contemporary commentators"), this broad construction of the Clause's reach would appear to be consistent with the contemporary views of the Framers. In addressing Congress shortly after the Whiskey Rebellion of 1794, President Washington opined that "certain self-created societies" had been responsible for encouraging the insurrection. 4 Annals of Cong. 788 (1794). As it turned out, certain members of Congress were none too fond of these "Democratic Societies" or "Jacobin Clubs" either, and when the House considered its ceremonial reply to the President's speech, Rep. Fitzsimons of Pennsylvania moved to insert a paragraph expressing "reprobation" of the societies. 4 Annals of Cong. 899. As Professor Currie has described it, "the friends of France exploded in wrath" at the suggestion. *See generally* David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* 190-91 (Chicago 1997). More to the present point, however, James Madison was of the specific opinion that including the paragraph would constitute a bill of attainder, because "denunciation" was punishment for purposes of that provision of the Constitution. 4 Annals of Cong. 934.

of perjury disclaiming any past sympathy for the Confederacy before engaging in certain professions [18] constituted punishment for attainder purposes. Noting that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact," 71 U.S. at 320, and that "[d]isqualification from the pursuits of a lawful avocation . . . may also [be], and often has been, imposed as punishment" under the English law, *id.* (citing 4 Blackstone, *Commentaries* at *44), he held that the oath requirements acted to exclude the burdened individuals from lawful employment on the basis of past conduct, and were therefore punishment for attainder purposes. *See Cummings*, 71 U.S. at 325; *Garland*, 71 U.S. at 380.

Although *Cummings* and *Garland* might be viewed as establishing that any exclusion from a profession on the basis of past conduct is punishment for attainder purposes,[19] a closer examination reveals a more subtle analysis. In both cases, a four-vote dissent written by Justice Miller was premised on the belief that the laws in question were enacted not to punish the burdened individuals but instead as a prophylactic measure to protect the public from their probable future bad acts. *See Garland*, 71 U.S. at 393-96 (Miller, J., joined by Chase, CJ., and

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[18] Ministry under a provision of Missouri's post-war constitution in *Cummings*, and the practice of law in federal court under a congressional enactment in *Garland*.

[19] *See, e.g., Cummings*, 71 U.S. at 321-22:

> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Swayne & Davis, JJ., dissenting) (arguing that, in the light of recent historic events, the oath requirement was merely a legitimate "qualification, exacted in self-defence, of all who took part in administering the government . . . and . . . was not passed for the purpose of inflicting punishment, however merited, for past offences"). Although obviously taking a different view of the ultimate outcome, Justice Field appeared to agree with Justice Miller's core proposition that a properly crafted prophylactic measure could survive attainder analysis, even where the finding of a propensity for future conduct was based solely on past acts, and the result was a bar from future employment. *See Cummings*, 71 U.S. at 319-20 (noting that "[i]t is evident from the nature of the pursuits and professions of the parties . . . that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions" and that the oath requirement, therefore, "was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment"); *Garland*, 71 U.S. at 379 ("The legislature may undoubtedly prescribe qualifications for the office, to which [the burdened individual] must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in the case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution.").

This relevance of applicational context and the proper existence of a "prophylactic" exception to the Bill of Attainder Clause [20] was developed further in *Dent v.*

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[20] The dissent erroneously credits us instead of Justices Miller and Field with the "discovery" of this exception. We have only supplied its moniker.

West Virginia, 129 U.S. 114 (1889), and *Hawker v. New York,* 170 U.S. 189 (1898). First, in *Dent,* Justice Field made a major interpretation of his own majority opinions in *Cummings* and *Garland* in the context of a bill of attainder challenge to a state law requiring certain educational qualifications in order to practice medicine. He held:

> The cases of *Cummings v. State of Missouri,* 4 Wall. 277, and of *Ex parte Garland, id.* 333, upon which much reliance is placed, do not, in our judgment, support the contention of the plaintiff in error. . . . They only determine that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, *respecting matters which have no connection with such professions.* Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts, or past expressions of desires and sympathies, *many of which had no bearing upon their fitness to continue in their professions.* The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state.

129 U.S. at 125-28 (emphasis added). In *Hawker,* the Court took the *Dent* analysis one step farther and upheld a state ban on medical practice by convicted felons as also not constituting punishment for purposes of the Bill of Attainder or Ex Post Facto Clauses. Relying ex-

pressly on the above quoted language in *Dent*, the Court held that the law was not unconstitutional because it did not "seek[] to further punish a criminal, but only to protect . . . citizens from physicians of bad character." *Id.* at 196.

Further development of the prophylactic exception emerged under Justice Frankfurter's tutelage. In *United States v. Lovett*, 328 U.S. 303 (1946), the Court examined a federal law that cut off salary payments to certain named federal employees, allegedly due to their "subversive" activities. Finding that the law " 'operate[d] as a legislative decree of perpetual exclusion' from a chosen vocation," and thus "accomplishe[d] punishment of named individuals without judicial trial," Justice Black struck it down as an unconstitutional bill of attainder. 328 U.S. at 316 (quoting *Cummings* and *Garland*). Justice Frankfurter took a slightly different view, however. Taking his cue from *Hawker* and the historical foundations of the Clause in the English law, he reiterated that "punishment is a prerequisite" for a bill of attainder, and that:

> Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, or because he is no longer qualified. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, *the circumstances attending and the causes of deprivation determining this fact.*"

328 U.S. at 324 (Frankfurter, J., joined by Reed, J., concurring [in the judgment]) (citing *Hawker* and *Dent*, and

quoting *Cummings*, 71 U.S. at 320, respectively) (emphasis added). Because he found no indication in the text of the statute or the circumstances of its passage that Congress intended it as a punitive measure, Justice Frankfurter concluded that it was not a bill of attainder. *Id.* at 324-27.[21]

Following *Lovett*, Justice Frankfurter's views on the Bill of Attainder Clause commanded a majority for a number of cases in which the Court rejected every attainder challenge that it considered. *See American Communications Ass'n v. Douds*, 339 U.S. 382, 413-14 (1950) (Vinson, CJ.) (rejecting attainder challenge to federal law conditioning recognition of a labor organization on the filing of affidavits by its officers that they did not belong to the Communist Party and did not believe in overthrow of the government by force); *Garner v. Board of Pub. Works*, 341 U.S. 716, 722-23 (1951) (Clark, J.) (same as to municipal ordinance requiring employees to take oath that they had not advocated, or belonged to organization advocating overthrow of government by force and violence in the preceding five years); *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (Frankfurter, J.) (same as to state law prohibiting felons from soliciting or receiving dues on behalf of any waterfront union); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (Harlan, J.) (same as to federal law providing for the termination of Social Security benefits of aliens who were deported on certain grounds); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 86-88 (1961) (Frankfurter, J.) (same as to federal law imposing registration and other burdens on "Communist-action" organizations). Although some of these decisions were premised in part

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[21] The dissent dismisses our reference to Justice Frankfurter's concurrence in *Lovett* because it did not reflect the majority view in that case. Such a back-of-the-hand to the alleged "cornerstone of the majority's theory" (*see* Dissent, p. —) ignores the influence of the Frankfurtian view in many subsequent cases cited herein.

on a strict historical reading [22] of the Clauses [23] as requiring that a bill specify the offense and clearly declare the guilt of the burdened individual or class to be unconstitutional,[24] they also maintained the prophylactic exception developed in *Hawker* and *Dent*. *See, e.g., Douds*, 339 U.S. at 413-14 (finding *Lovett, Garland*, and *Cummings* distinguishable because "in the previous decisions the individuals involved were in fact being punished for past

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[22] Since expressly abandoned. *See Brown*, 381 U.S. at 447.

[23] Based on Justice Frankfurter's general model of bifurcated constitutional adjudication:

> Broadly speaking two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (e.g. "due process," "equal protection of the laws," "just compensation"), and the division of power as between States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits. The prohibition of bills of attainder falls of course among these very specific constitutional provisions.

Lovett, 328 U.S. at 321 (Frankfurter, J., joined by Reed, J., concurring [in the judgment]).

[24] *See Lovett*, 328 U.S. at 321-23 (Frankfurter, J., joined by Reed, J., concurring [in the judgment]) ("The distinguishing characteristic of a bill of attainder is the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence. . . . All bills of attainder specify the offense for which the attainted person was deemed guilty and for which the punishment was imposed. There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable ex post facto.").

actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into future conduct," and noting that, even though "the history of the [burdened individuals'] past conduct was the foundation for the judgment as to what the future conduct is likely to be," that fact "does not alter the conclusion that [the statute] is intended to prevent future action rather than to punish past action"); *DeVeau*, 363 U.S. at 160 (finding that the state "sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony"); *Flemming*, 363 U.S. at 617 (noting, with respect to the statute before the Court, that "it cannot be said, as was said of the statute in *Cummings*, that [the disability imposed] bears no rational connection to the purposes of the legislation of which it is a part, and must without more therefore be taken as evidencing a Congressional desire to punish") (citing *Cummings*, 71 U.S. at 319, and *Dent*, 129 U.S. at 126).

After this Frankfurtian phase, however, the Court appeared to pointedly reassess the essential nature of the Clause, and the scope of the punishment requirement. In *United States v. Brown*, 381 U.S. 437 (1965), after surveying the above described cases, Chief Justice Warren viewed the Bill of Attainder Clause as expressive of some of the most fundamental ideals of separation of powers, in addition to its more specific prohibition:

> [T]he Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, spe-

> cific persons. "Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited, —the very class of cases most likely to be prosecuted by this mode." By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rulemaking. "It is the peculiar province of the legislature to describe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."

381 U.S. at 445-46 (quoting 1 Cooley, *Constitutional Limitations* 536-37 (8th ed. 1927), and *Fletcher*, 10 U.S. at 136, respectively).[25] Acting on this broad view

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[25] *See also Landgraf v. USI Film Prod.*, 511 U.S. 244, 267 n.20 (1994) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring in part and concurring in the judgment)):

> Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.

and The Federalist No. 44, at 301 (James Madison) (J. Cooke ed. 1961):

> Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . The sober people of America are weary of the fluc-

of the Clause's role in the constitutional structure, Chief Justice Warren held that the law in question—making it a crime for a past or current member of the Communist Party to hold certain union positions with a potential to disrupt interstate commerce—was an unconstitutional bill of attainder:

> The statute does not set forth a generally applicable rule decreeing that any person who . . . possesses certain characteristics . . . shall not hold union office, and leave to courts and juries the job of determining what persons . . . possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.

Id. at 450.

The broad holding in *Brown* was not without its caveats, however, and to these we must turn in order to assess the precise role of punishment in the case. In distinguishing § 32 of the Banking Act of 1933—providing that the officers, directors, and employees of certain securities firms could not serve as officers, directors, or employees of member banks in the Federal Reserve System—from the statute at issue, the Court noted that:

> [The union law], unlike § 32 of the Banking Act, inflicts its deprivation upon the members of a political group thought to present a threat to national security. As we noted above, such groups were the targets of the overwhelming majority of English and

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tuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprizing and influential spectators; and snares to the more industrious and less informed part of the community.

> early American bills of attainder. Second, § 32 incorporates no judgment censuring or condemning any man or group of men. In enacting it, Congress relied upon its general knowledge of human psychology, and concluded that the concurrent holding of the two designated positions would present a temptation to any man—not just certain men or members of a certain political party. Thus insofar as § 32 incorporates a condemnation, it condemns all men. . . . In designating bank officers . . . Congress merely expressed the [general] characteristics it was trying to reach in an alternative, shorthand way.

Id. at 453-54.

Thus, although *Brown* began with a fairly broad construction of the Clause, and thereby supplied SBC with a large portion of its argument in the instant case, it did not purport fully to abandon the prior development of the punitive element. As the above discussion makes clear, one of the key reasons that the Court found § 32 distinguishable was that it did not incorporate a "judgment censuring or condemning any man or group of men." Further, the Court explicitly left open the possibility of accomplishing non-punitive, prophylactic economic legislation by way of "shorthand" designations.

This latter theme was picked up one last time in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), where the Court summarized and rationalized its extensive attainder jurisprudence and developed the most comprehensive analysis of the punishment prong that has been offered to date. In that case, the Court upheld a law that, as noted, directed Richard M. Nixon by name to turn over his presidential papers to the Administrator of General Services. After discussing why Nixon "constituted a legitimate class of one," *see* supra, note 12, the Court went on to explain that, even if the specificity element were deemed to be satisfied, it would still have to inquire whether Congress " 'inflict[ed] punish-

ment' within the constitutional proscription." 433 U.S. at 472-73 (quoting *Lovett*, 328 U.S. at 315). After examining the historical underpinnings of the Clause and noting that the statute at issue did not involve any of the traditional examples of "punishment" which had been held to implicate attainder analysis in the past—including death, imprisonment, banishment, punitive confiscation of property, and employment bars (as evidenced by *Cummings*)—the Court launched into a three-stage examination of general punitive character. *See id.* at 473-75. First, the Court noted that it "often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *See id.* at 475 (citing *Cummings*, 71 U.S. at 319-320, *Hawker*, 170 U.S. at 193-194, and *Dent*, 129 U.S. at 128, among other cases). Because the protection of Nixon's presidential papers was unquestionably a legitimate, nonpunitive legislative purpose that the burdens imposed by the statute were well designed to further, the Court concluded that the law was nonpunitive under the functional approach. *See id.* at 476-78. Next, the Court looked to legislative purpose. Because there was no indication in the legislative history of a specific intent to punish—unlike in past cases like *Lovett*, where the House Report characterized the named individuals as " 'subversive . . . and . . . unfit . . . to continue in Government employment' "—the Court concluded that this test also came out in favor of a nonpunitive finding. *See id.* at 478-80 (quoting *Lovett*, 328 U.S. at 312). Finally, the Court turned to the structure of the statutory provisions. Because it also evinced a nonpunitive quality to the legislation, by protecting, for example, Nixon's ability to access the papers himself and to raise claims of privilege with regard to them in court proceedings, the Court concluded that this test also indicated a nonpunitive character. *See id.* at

481-82. Because the statute did not "impose criminal penalties or other punishment," the Court concluded that it was not a bill of attainder, regardless of its specificity. *Id.* at 482 (quotations omitted).

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In the light of the 400 years of case law and history that we have considered, we believe that *Nixon* stands, ultimately and concisely, for the following proposition: if legislation has a legitimately nonpunitive function, purpose, and structure, it does not constitute punishment for purposes of the Bill of Attainder Clause, even where it imposes the historically punitive sanction of barring designated individuals from engaging in certain professions. This statement is consistent with the older, traditional lines of analysis in the Court's attainder jurisprudence, including particularly the prophylactic exception developed in *Cummings, Garland, Dent, Hawker,* and Justice Frankfurter's concurrence in *Lovett.* It is also not inconsistent with the more sweeping separation of powers theory espoused by Chief Justice Warren in his somewhat aberrant *Brown* opinion, at least to the extent that that case left open the possibility of using "shorthand" designations in otherwise proper categorical legislation. Although some portions of *Nixon* might be read to suggest that historical punishments are "inherently suspect," [26] we find this suggestion inapposite to the particular area of employment bars. As *Nixon* makes clear, this type of liability is only an "historical" punishment to the extent that certain examples have been declared punitive in past cases like *Cummings* and *Lovett. See Nixon,* 433 U.S. at 474.

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[26] *See id.*, 433 U.S. at 473 (noting that "the substantial experience of both England and the United States with such abuses of parliamentary and legislative power offers a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of Art. I, § 9" and that "[a] statutory enactment that imposes any of those sanctions on named or identifiable individuals would be immediately constitutionally suspect").

Because these building blocks for the historical characterization themselves contain the very seeds of the prophylactic exception, and because *Nixon*'s "functional test" is rooted in that very exception as developed in the employment bar cases of *Hawker, Dent,* and *Cummings, see Nixon,* 433 U.S. at 475, it simply cannot be convincingly maintained that employment bars are inherently historically punitive without reference to *Nixon*'s other considerations.

More importantly, however, such a reading would contradict the Supreme Court's own most recent recapitulation of the punishment prong. In *Selective Service,* the Court stated that:

> In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."

468 U.S. at 852 (quoting *Nixon,* 433 U.S. at 473, 475-76, & 478, respectively). Nothing in *Selective Service* suggests that the historical punishment test is ever dispositive on its own, or that it should be conducted without reference to the actual history underlying the sanction at issue, and we decline to read such a ritualistic and unsensible formulation into the Clause. *See also BellSouth,* 144 F.3d at 65 (stating that "[e]ven measures historically associated with punishment—such as permanent exclusion from an occupation—have been otherwise regarded when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing") (internal quotations omitted); *Dehainaut,* 32 F.3d at 1071 (stating that, "[e]ven where a fixed identifiable group . . . is singled out and a burden traditionally associated with

punishment—such as permanent exclusion from an occupation—is imposed, the enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and nonpunitive ends and was not clearly the product of punitive intent").

3

Adapting the *Selective Service* formulation to this case in the light of our inquiries, the question becomes whether the Special Provisions, viewed in terms of the type and severity of burdens imposed and the expressed intent of Congress, reasonably can be said to further nonpunitive legislative purposes such that the sanction at issue, a bar from participation in certain businesses, is neither historically nor functionally nor motivationally punitive. We can only conclude that they can, and therefore find that the Special Provisions are constitutionally sound.

First and perhaps foremost, we think that the Special Provisions are not punitive because they do not impose a perpetual bar on the BOCs' entry into any of life's avocations. In *Cummings, Garland,* and *Lovett,* the burdened individuals were barred from all future employment in certain professions based on immutable past acts. Under the Special Provisions, on the other hand, the BOCs will be allowed to enter each of the affected areas as soon as the statutory criteria regarding competition in their local service markets are met, and, in the case of information services, in 2001 regardless. As the Supreme Court expressly stated in *Selective Service,* "[a] statute that leaves open perpetually the possibility of [qualifying for some specifically denied benefit] does not fall within the historical meaning of forbidden legislative punishment." 468 U.S. at 853.[27]

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[27] We recognize that meeting the competition criteria may not be an easy matter for the BOCs. Still, nothing in the statute or SBC's recent experiences with the FCC and the D.C. Circuit leads us to suspect that it will be impossible, and we are satisfied that the BOCs will be able to emerge from the restrictions when it is in their economic and business interest to meet the stiff criteria.

Second, we conclude that the Special Provisions are not punishment because they serve a nonpunitive purpose: attempting to ensure fair competition in the markets for local service, long distance, telecommunications equipment, and information services. Indeed, even under the MFJ, we do not understand that the line-of-business restrictions imposed on the BOCs were intended to have a punitive function. As Judge Greene stated, the restrictions were imposed because "[p]articipation in these fields carries with it a substantial risk that the Operating Companies will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors." *United States v. AT&T*, 552 F.Supp. at 224. This rationale seems much more like a judgment "condemning all men" in certain inherently conflicted positions than an impermissible "judgment censuring or condemning any man or group of men" for their personal conduct, *see Brown*, 381 U.S. at 453-54, so to the extent that Congress was merely reimposing the MFJ, it did not engage in action derivatively punitive. Furthermore, the actual terms of the Special Provisions stay close to their legitimate ends. By clearly linking a lifting of the long distance and telecommunications equipment restrictions to competition in the BOCs' local markets, and by making the structural separation condition for entry into the nascent and vulnerable information services market temporary, Congress has tailored the burdens imposed to an appropriate end of promoting competition. Finally, and although SBC has argued fervently to the contrary, the mere fact that the Special Provisions are limited in application to the BOCs (and thus do not cover other LECs with substantial local market power, like GTE) does not cast substantial doubt on the fit of this tailoring. As the D.C. Circuit has expressly recognized, "[b]ecause the BOCs' facilities are generally less dispersed than GTE's, they can exercise bottleneck control over both ends of a [long distance] telephone call in a higher fraction of cases than GTE" (or any of the other LECs, for that matter),

and it is thus rational to subject them to additional burdens in order to achieve the overall goal of competitive local and long distance service. *BellSouth*, 144 F.3d at 67.

Third, we reason that the Special Provisions are not punitive because neither their terms nor their legislative history demonstrates the "smoking gun" evidence of punitive intent necessary to establish a bill of attainder. As the Supreme Court clarified in *Selective Service*, " 'unmistakable evidence of punitive intent . . . is required before a Congressional enactment of this kind may be struck down' " on attainder grounds. *Id.*, 468 U.S. at 856 n.15 (quoting *Flemming*, 363 U.S. at 619); *cf. Lovett*, 328 U.S. at 315 (for an example of such evidence). To be sure, there were some isolated references in congressional debate to the Bell System's questionable business practices prior to the MFJ, which were offered as evidence of the general potential for abuse of local market power. But, still, SBC has pointed us towards no indication that the Special Provisions were themselves enacted to punish the BOCs for past antitrust violations. Instead, the legislative record is really quite clear that Congress—certainly as a whole—considered the Special Provisions to be just what they appeared to be: a prophylactic, compromise regulation of the BOCs' local market power to ensure greater competition in all of the nation's telecommunications markets.

Finally, and perhaps most fundamentally, we conclude that the Special Provisions are not punitive because they were part of a larger quid pro quo. Combined with § 601(a)(1), the Special Provisions represent a hard-fought compromise on a massive issue of public policy which, in the end, contained both good and bad elements for the BOCs.[28] For example, although the information

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[28] *See SBC Communications*, 138 F.3d at 412:

> The question of how best to achieve [the goals of the Act] . . . was the subject of great debate. Some thought that the local and long-distance markets should be open to all competitors immediately. Others believed that the BOCs should have

services restriction lifted under the MFJ was partially reimposed under § 274, the BOCs were immediately freed, by operation of § 601(a)(1) and the other Special Provisions, from existing MFJ restrictions on their ability to offer incidental and out-of-region long distance service. More importantly, the Special Provisions gave the BOCs a clear delineation of what they needed to do to achieve a lifting of all the old MFJ restrictions in the future—certainly a step up, from the BOCs' perspective, from being under Judge Greene's perpetual supervision. It is perhaps for this reason that the BOCs have apparently consistently represented, outside of litigation, that they were pleased with the Act. Indeed, in a public news release, SBC's Chairman lauded the Act as "landmark legislation" that would allow SBC "immediately [to] provide long-distance service outside [its] . . . region and to [its] cellular customers everywhere," and that created "clear and reasonable pathways" for SBC to obtain permission to provide in-region long distance service in the future—"pathways that [SBC was] happy with." The other BOCs made similar comments, and they clearly were effective in persuading Congress of their support for the Act. *See* 142 Cong. Rec. S393 (daily ed. Jan. 26, 1996) (remarks of Sen. Pressler) ("We now have the regional Bell companies supporting the bill and we have the long-distance companies supporting the bill. That is an unusual, rare moment in American history when the regional Bells and long-distance companies are temporarily at peace, so to speak."); *id.* at S696 (daily ed. Feb. 1, 1996) (statement of Sen. Kerrey) (noting that the Act was "a very unusual piece of legislation in that the demand for it [wa]s coming from . . . the whole range of corporations; . . . RBOC's, long-distance, cable, broad-

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to wait until actual competition was introduced in their local markets before providing interLATA service, since it was claimed that the long-distance market is already competitive. As might be expected for an issue of this economic significance, an extended lobbying struggle ensued. The end product was a compromise between the competing factions.

cast; all of them"); *id.* at S699 (daily ed. Feb. 1, 1996) (statement of Sen. Lott) ("The telephone companies are supporting this legislation. The long-distance companies are supporting this legislation—both of them would like to have a little more in their sections, but basically they know this is good legislation . . . ."). Be that as it may, it is at any rate clear that a legislative quid pro quo on this level simply cannot be punitive for attainder purposes.

For all of the foregoing reasons, we find that the Special Provisions ultimately are nonpunitive as an historical, functional, and motivational matter. They are therefore not an unconstitutional and odious bill of attainder as that term has been defined by the Supreme Court. To the extent that the district court concluded otherwise, it was in error, and its decision on that point is accordingly reversed.

B

As noted above, however, SBC and the other appellees also urge three additional constitutional arguments as alternate bases for affirming the judgment of the district court. Having found the Special Provisions not to constitute a bill of attainder, we must obviously consider these alternate theories. We do so only briefly, however, as they are far less substantial.

1

The appellees first make two interrelated arguments that the Special Provisions violate the constitutional requirement of separation of powers—i.e., that the Special Provisions represent an arrogation to the legislative branch of powers functionally vested in the judicial branch by the very firmament of the Constitution. *See generally Plaut,* 514 U.S. at 218-25 (noting, among other things, that "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers" and felt a "sense of a sharp necessity to separate

the legislative from the judicial" in designing their new system). Despite their strong institutional pedigree, neither argument has significant merit.

First, the appellees contend that the Special Provisions violate separation of powers because they address themselves to a particular judicial consent decree—the MFJ—in such a way as to alter the result. They rely on the well accepted rule that it violates separation-of-powers principles for Congress to reopen any adjudication that represents the "final word of the judicial department" on a case. *See Plaut*, 514 U.S. at 225-27. Yet under *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), it has long been clear that Congress may change the law underlying ongoing *equitable* relief, even if, as in *Wheeling* itself, the change is specifically targeted at and limited in applicability to a particular injunction, and even if the change results in the necessary lifting of that injunction. *See id.* at 429. The only real question on this point would seem to be whether *Wheeling* survives the Court's more recent separation of powers jurisprudence, as recently recited in *Plaut*. In that case, however, Justice Scalia could hardly have been more clear that "nothing in our holding today calls [*Wheeling*] into question." *Id.*, 514 U.S. at 232.

Obviously, *Wheeling* survives, as all of the circuit courts to consider separation-of-powers challenges to the Prison Litigation Reform Act of 1995 recently concluded. In those cases the courts dealt with a statute, 18 U.S.C. § 3626(b)(2), that mandated the termination of certain existing consent decrees if they were not based upon a newly announced standard of factual findings. In upholding this provision in the face of a separation-of-powers attack, five courts held that Congress could interfere with ongoing consent decrees, because such decrees were not "final judgments" for separation-of-powers purposes.[29] In-

[29] *See Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997) (per curiam) ("As the Court explained in *Plaut v. Spend-*

deed, even the one court to strike down § 3626(b)(2) was forced to concede that "*Wheeling* established the principle that the state of the law at the time a final judgment embodying a permanent injunction is entered is not part of what is 'final' about the judgment." *Taylor v. United States*, 143 F.3d 1178, 1182 (9th Cir. 1998) (Ristani, J.).

Despite this great weight of authority, the appellees counter that the congressional interference in this case is more suspect, because it is so specific. Yet, as noted, the legislation in *Wheeling* was rife with specificity: the change effected by Congress was specifically directed at

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thrift Farm, Inc., a true 'final judgment' here means not an appealable judgment, but one that represents the 'last word of the judicial department with regard to a particular case or controversy.' Consent decrees are final judgments, but not the 'last word of the judicial department.' "); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997) (Selya, J.) ("*Plaut* and *Wheeling Bridge*, read together, teach that equity requires, and the separation of powers principle permits, legislatures to direct that courts respond to changes in substantive law by revisiting forward-looking injunctions."); *Benjamin v. Jacobsen*, 124 F.3d 162, 171 (2d Cir. 1997) (Calabresi, J.) ("In distinguishing *Wheeling Bridge*, the *Plaut* Court implicitly drew a similar distinction between two kinds of final judgments for separation of powers purposes—final judgments without prospective effects, which could not be constitutionally revised through legislation, and final judgments with prospective effects, whose effects could be constitutionally so revised."); *Gavin v. Brandstad*, 122 F.3d 1081, 1087 (8th Cir. 1997) (Bowman, J.) ("*Plaut* does not hold that final judgments are invariably immune to congressional tinkering; what *Plaut* protects is 'the last word of the judicial department with regard to a particular case or controversy.' In a continuing case, a consent decree is not the last word of the courts in the case, even after the decree itself has become final for purposes of appeal."); *Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (Wilkins, J.) ("[A]s made clear by the Court in *Plaut*, an attempt to alter legislatively a legal judgment violates the separation-of-powers doctrine. A judgment providing for injunctive relief, however, remains subject to changes in the law. These principles apply equally to consent decrees and litigated judgments.") (citations to *Wheeling* and other cases omitted).

altering the legal status of a single, named bridge in order to change the result of a particular injunction. *See id.*, 59 U.S. at 429. Specificity was also manifestly evident in the more recent related case of *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 434-35, 437-40 (1992), where Justice Thomas, writing for a unanimous Court, found no separation-of-powers problem in a statute that changed the law with respect to two pending lawsuits identified by name and caption number. In the light of all these precedents, we simply cannot see a separation-of-powers problem based on the Special Provisions' interference with the MFJ in this case.

That leaves the second line of attack, which, as we understand it, is a not-too-well-defined argument that all of the problematic aspects of the Special Provisions—including particularly their specificity, their interference with the MFJ, and the near-punitive nature of the liability they impose—when added together somehow amount to a separation-of-powers violation that is greater than the sum of its parts. Although this argument finds appealing rhetorical support in the more sweeping statements of some of the Court's older cases, including particularly the admonition offered by Justice Marshall in *Fletcher* and seconded by Chief Justice Warren in *Brown* that "[i]t is the peculiar province of the legislature to describe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments," *see Brown*, 381 U.S. at 446, it is squarely and specifically contradicted by *Plaut*. In that case, Justice Breyer raised a very similar argument in his one-vote concurrence. *See id.*, 514 U.S. at 241-46. Justice Scalia's six-vote majority opinion soundly rejected it, however, noting (in addition to the above-quoted statement from footnote nine) that:

> The nub of th[e] infringement consists not of the Legislature's acting in a particularized and hence according to the concurrence) nonlegislative fashion;

> but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized . . . or that it is not accompanied by an "almost" violation of the Bill of Attainder Clause, or an "almost" violation of any other constitutional provision.

See id. at 239 & n.9. In the light of *Plaut*, there is thus no viability to the "amorphous" theory either, and the appellees' separation-of-powers challenge in this case must fail.

2

The appellees next argue that the Special Provisions violate the Equal Protection Clause by discriminating against the BOCs by name. Under *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), however, specification of named parties in economic regulation is clearly permissible for equal protection purposes so long as the regulation is rationally related to a legitimate governmental interest and does not trammel fundamental personal rights or draw upon inherently suspect distinctions such as race, religion, or alienage. *Id.* at 304-06. As should be manifest from the entire history of this area of the law, regulation of an LEC's conduct in the local telephone service market neither restricts fundamental individual rights nor lacks rational relation to the government's legitimate interest in ensuring greater competition in all telecommunications markets. Furthermore, the specification of the BOCs in the Special Provisions at issue here was not based on invidious criteria like race, religion, or alienage. As such, the Special Provisions are not inconsistent with the Equal Protecton Clause.

3

Finally, the appellees urge that, even if the other Special Provisions are allowed to stand, § 274 must go as it impermissibly infringes the BOC's right to free speech. The D.C. Circuit recently rejected an identical challenge

to § 274 by another RBOC, however, *see BellSouth*, 143 F.3d at 67-71, and we can find no reason to disagree with its result and analysis. Because § 274 does not in any way differentiate speech on the basis of content, its speech restricting provisions are subject only to (at most) intermediate scrutiny review under *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) (*Turner I*). Under that standard, a restriction will be upheld "if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct. 1174, 1186 (1997) (*Turner II*). Obviously, the competition-enhancing interests discussed above are manifestly sufficient to meet the first hurdle. Furthermore, because § 274 merely imposes a structural separation requirement on speech activities, not an absolute bar, its restrictions are practically de minimis in this necessarily corporate context, and certainly do not burden substantially more speech than necessary to accomplish its legitimate goals. For these reasons, the contention that § 274 violates the BOCs' right to free speech is entirely lacking in merit.

V

In the end, the constitutional prohibition against bills of attainder is a specific rather than a general guaranty of rights. *Cf. Lovett*, 328 U.S. at 321 (Frankfurter, J., joined by Reed, J., concurring [in the judgment]). Nothing in the Court's jurisprudence should be read to allow that specific guaranty wholly to escape the implications of its historical origins, and since the age of Blackstone and before, it has been clear that for a bill to attaint, it simply must invoke the punitive. In this case, that has not occurred. Although the Special Provisions may well constitute a legislative judgment that the BOCs currently have an inherent and natural potential to restrain competition by virtue of their local market power, the Act does not declare them monsters or otherwise seek to pun-

ish them on the basis of past conduct, and thus does not run afoul of the Bill of Attainder Clause. Because the Constitution's additional requirements of separation of powers, equal protection of the laws, and free speech are also not even arguably infringed by the Act, the judgment of the district court is accordingly REVERSED.[30]

JERRY E. SMITH, Circuit Judge, dissenting:

En route to minting a "regulatory exception" to the Bill of Attainder Clause, the majority holds that punishment is not punishment when it is inflicted with a "prophylactic" intent. The majority reaches this cherished goal by stitching together a patchwork of concurrences and dissents and by brushing aside binding Supreme Court majority opinions as "aberrant" and "unsensible." I respectfully dissent.

I.

The Telecommunications Act of 1996 singles out twenty named corporations for severe line-of-business restrictions

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[30] We are unable to see this case in the single-minded terms expressed in the dissenting opinion. We have faithfully, to the best of our ability, recounted the sinuous journey of bills of attainder from the earliest days to the present day. Like a Christmas pie, these cases—as a whole and indeed individually—provide a little something for every taste, and are rich with selective quotes to support a chosen conclusion. In arriving at our conclusions, we have tried to synthesize these diverse expressions and applications of the bill of attainder clause in order to apply it in this context of business regulation—its first such application. What we think the dissenting opinion has not observed in its straightforward stride is that attainder requires an element of punishment. There are employment bars and there are employment bars—some of the same character, others of a different character. A non-perpetual legislative bar, which forbids only a corporation's participating in a particular segment of the general business in which the corporation is engaged is not punishment when that bar is enacted for non-punitive appropriate legislative purposes under conditions to which that business effectively has agreed. Indeed, we are not sure the dissent is otherwise convinced given its acknowledgment that there is no real "victim" of Congress in this case.

characterized, in the Act's telling language, as the "Special Provisions." This case hinges on whether these economic restrictions, which bar the named firms from lucrative telecommunications markets, amount to legislative "punishment" as historically understood.

A.

The Supreme Court has consistently held that bars to employment constitute punishment for purposes of the Bill of Attainder Clause. In one of the earliest bill of attainder cases, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866), the Court observed that "[d]isqualification from the pursuits of a lawful avocation . . . may also, and often has been, imposed as punishment." The Court struck down, as a bill of attainder, a provision in the Missouri Constitution prohibiting Confederates or their sympathizers from holding certain jobs. The Court recognized that "in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, *and can be in no otherwise defined*." *Id.* at 321-22 (emphasis added).

The law has not changed. In *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), the Court applied *Cummings*'s reasoning to strike down, as a bill of attainder, a federal statute barring Confederates from practicing in the federal courts. More recently, in *United States v. Lovett*, 328 U.S. 303 (1946), the Court reaffirmed the principle that line-of-work restrictions are inherently punitive, invalidating a federal statute terminating the salaries of three named federal employees. And in *United States v. Brown*, 381 U.S. 437 (1965), the Court once again held that a statute proscribing entry into a certain line of work constituted punishment, striking down a federal statute that forbade members of the Communist Party from serving as labor union officials.

Any doubt that employment bars fall squarely within the historical conception of punishment was erased by the Court's two most recent bill of attainder cases. In *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977), the Court canvassed the various burdens historically deemed punitive, concluding that "[o]ur country's own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations . . . ."

The Court's latest pronouncement, in *Selective Serv. Sys. v. Minnesota PIRG*, 468 U.S. 841 (1984), echoes *Nixon*: "In our own country, the list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions." 468 U.S. at 852. Indeed, employment bars "have constituted the most common sort of statutes struck down by the Court as unconstitutional bills of attainder." *BellSouth Corp. v. FCC*, 144 F.3d 58, 72-73 (D.C. Cir. 1998) (Sentelle, J., dissenting) (citing *Selective Service*, 468 U.S. at 852).

The majority's ancillary argument that "the Special Provisions are not punitive because they do not impose a perpetual bar" is meritless. The majority quotes *Selective Service*, 468 U.S. at 853, which states that "[a] statute that leaves open perpetually the possibility of [qualifying for some specifically denied benefit] does not fall within the historical meaning of forbidden legislative punishment" (brackets added by majority). But in *Brown*, the Court had already considered and rejected the majority's escapability argument, explaining:

> We do not read [two prior cases] to have set up inescapability as an absolute prerequisite to a finding of attainder. Such an absolute rule would have

> flown in the face of explicit precedent, *Cummings v. Missouri,* 4 Wall. 277, 324, as well as the historical background of the constitutional prohibition. A number of ante-Constitution bills of attainder inflicted their deprivations upon named or described persons or groups, but offered them the option of avoiding the deprivations, e.g., by swearing allegiance to the existing government.

381 U.S. at 457 n.32. This illustrates that the Bill of Attainder Clause cannot be avoided simply by inserting into the statute a means of escape. The fact that the federal government holds the key to the Baby Bells' prison is irrelevant.

B.

Faced with the unhappy reality of well over a century of Supreme Court cases holding that employment bars constitute punishment, the majority announces the discovery of a heretofore unrecognized exception to the Bill of Attainder Clause: the "prophylactic exception." Apparently this creature awakens only in cases such as this—when Congress punishes, but acts with a beneficent, regulatory intent.

The method through which the majority traces the evolution of the "prophylactic exception" reveals its suspect pedigree. The exception's origin is said to lie in Justice Miller's dissent in *Garland,* where he suggested that the employment bar at issue was not punitive because Congress did not intend it as such. Rather, Justice Miller argued, the statute should properly be viewed as a prophylactic measure, because Congress merely sought to protect the public from the *future* misdeeds of the attainted individuals. *See* 71 U.S. (4 Wall.) at 393-96 (Miller, J., dissenting).

This theory, rejected by the *Garland* majority, was purportedly adopted some decades later in *Dent v. West Virginia,* 129 U.S. 114 (1889), and *Hawker v. New York,*

170 U.S. 189 (1898). Unlike most of the authorities the majority relies on to support the prophylactic exception, *Dent* and *Hawker* are *majority* opinions. But they have little to say about this case: The statute at issue in *Dent* did not single out individuals for punishment, but concerned a state's generally applicable licensing requirements; similarly, the burden in *Hawker* was imposed on a class rather than named individuals. In any event, no subsequent case has interpreted *Dent* and *Hawker* the way the majority does here—as authorizing congressional punishment of individuals as long as the statute can be said to prevent future harms.

The cornerstone of the majority's theory is Justice Frankfurter's concurrence in *Lovett*, 328 U.S. at 318. Although Justice Frankfurter distinguished between "harm [that is] inflicted by government authority" and "punishment," *id.* at 324 (Frankfurter, J., concurring), the majority of the Court refused to embrace this view. *Cf. Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996) (holding that a minority opinion is "of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality"). Rather than adopt Justice Frankfurter's narrow reading of the Bill of Attainder Clause, the Court majority held that the challenged law, which terminated the salaries of three named federal employees, " 'operates as a legislative decree of perpetual exclusion' from a chosen vocation" and therefore "clearly accomplishes the punishment of named individuals without a judicial trial." *Lovett*, 328 U.S. at 316 (quoting *Garland*, 71 U.S. (4 Wall.) at 377). The majority quite plainly equated employment bars with punishment.

Finally, *Brown* and *Nixon* foreclose any suggestion that the full Court subsequently adopted Justice Frankfurter's minority view. *Brown*, which the panel majority cryptically claims "did not purport fully to abandon the prior

development of the punitive element," concluded that the employment restriction at issue—barring members of the Communist Party from holding certain jobs—amounted to punishment. The Court surveyed its bill of attainder jurisprudence and, relying on *Garland* and *Lovett*, held that the statute "plainly constitutes a bill of attainder" because "it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office . . . ." 381 U.S. at 449, 450.

Nixon is even more direct. There, the Court explained that "legislative enactment[s] barring designated individuals or groups from participation in specified employments or vocations" are "impermissible" and "unquestionably have been held to fall within the proscription of Art. I, § 9." 433 U.S. at 473, 474. This stark language leaves little room for the majority's "prophylactic exception": Impermissible is impermissible. Once a court determines that Congress has imposed a burden historically deemed punitive, such as the employment bar at issue here, that is the end of the analysis. The majority protests that such a reading of *Nixon* is "ritualistic and unsensible," but it is difficult to squeeze a prophylactic exception out of the Court's statement that "[a] statutory enactment that imposes [an employment bar] on named or identifiable individuals would be *immediately constitutionally suspect*." *Id.* at 473 (emphasis added).

Moreover, to the extent the Court considered congressional purpose in passing the law, it did so only after it had determined that the challenged burden did not fit the historical definition of punishment; its consideration of legislative intent was a means of ensuring that "new burdens and deprivations [are not] legislatively fashioned that are inconsistent with the bill of attainder guarantee." *Id.* at 475.

The Court began its analysis by asking whether the burden—the confiscation of presidential records—fell into

the category of "immediately suspect" punishments, such as a bar to employment. After concluding that President Nixon "cannot claim to have suffered any of these forbidden deprivations at the hands of Congress," the Court remarked that "our inquiry is not ended by the determination that the [statute] imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause." *Id.* at 475. *Only then* did the Court turn to legislative purpose—an inquiry that would not have been necessary if President Nixon *had* suffered one of the "forbidden" deprivations.

The *Selective Service* Court clarified this point. It explained:

> Our inquiry does not end with a determination that [the statute] does not inflict punishment in its historical sense. To ensure that the Legislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder, we must determine whether the challenged statute can be reasonably said to further nonpunitive goals.

468 U.S. at 853-54 (citing *Nixon*, 433 U.S. at 475-76).

The majority's reading of these cases is sadly ironic. In both *Nixon* and *Selective Service*, the Court sought to *expand* the protections of the Bill of Attainder Clause by looking to legislative purpose. The Court's concern was congressional creativity in dreaming up new burdens that fell outside the category of burdens historically deemed punitive; by considering legislative intent, the Court erected an *additional* safeguard to protect individuals from new types of congressionally-devised punishment.

The majority's interpretation, by contrast, *contracts* the scope of the clause. The majority looks to legislative intent not to protect citizens from congressional overreaching, but as a means of empowering Congress to pass punitive laws it could not otherwise enact—simply by claiming an intent to "regulate" rather than punish.

Thanks to the prophylactic exception, Congress may now single out individuals for punishments that were, until today, routinely held unconstitutional.

C.

In deeming nonpunitive a burden that the *Nixon* Court characterized as "unquestionably" punitive, 433 U.S. at 473, the majority reasons that punishment is not really punishment if it is inflicted for preventive purposes. The majority concludes that "[a]lthough the Special Provisions may well constitute a legislative judgment that the BOCs currently have an inherent and natural potential to restrain competition by virtue of their local market power, the Act does not declare them monsters or otherwise seek to punish them on the basis of past conduct, and thus does not run afoul of the Bill of Attainder Clause." The majority distinguishes between retribution (the imposition of a burden for wrongful past conduct) and prevention (the imposition of a burden to reduce the likelihood of future harms—here, antitrust violations).

This distinction is flatly contradicted by *Brown*, which rejects such a cramped view of punishment and undermines the majority's novel interpretation of the clause. In holding that an employment bar constituted punishment, even when imposed for prophylactic purposes, the Court explained:

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent —and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.
>
> Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes—that is, the

> legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.

381 U.S. at 458-59.

Consider a statute that sentences to death a named individual who announces that he has criminal tendencies —but has yet to commit a crime. Under the majority's theory, this law is not a bill of attainder: It does not "seek to punish on the basis of past conduct," and it serves a legitimate prophylactic function. This hypothetical illustrates the impossibility of confining the clause's protections to retributive measures. As the Court explained, a burden is rendered no less punitive by being based on future, rather than past, wrongdoing.

In fact, the majority's concession that "the Act may well constitute a legislative judgment that the BOCs currently have an inherent and natural potential to restrain competition" falls squarely within the Court's description of a bill of attainder: when "the legislature [makes] a judgment . . . that a given person or group [is] likely to cause trouble . . . and therefore [inflicts] deprivations upon that person or group in order to keep it from bringing about the feared event." *Id.* at 458-59. Here, Congress made a legislative judgment that the BOC's were likely to cause trouble—they were likely to commit antitrust violations—and inflicted deprivations (severe line-of-business restrictions) in order to keep the Baby Bells from bringing about the feared event. Accordingly, under a straightforward application of *Brown*, the "prophylactic exception" is a chimera, and the Special Provisions are a bill of attainder.

D.

In sum, the unbroken line of Supreme Court precedent compels the conclusion that the Special Provisions, because they impose an employment bar, constitute historical punishment forbidden by the Bill of Attainder Clause. The Court has never held that Congress can single out named individuals for burdens historically deemed punitive simply because legislators are animated by a well-meaning, regulatory spirit. Yet that is precisely what the majority holds today, sidestepping the *Nixon* Court's statement, 433 U.S. at 473, that this type of law is "immediately constitutionally suspect."

II.

The Bill of Attainder Clause has long been regarded as protecting unpopular individuals or groups from trial-by-legislature. As the Court explained in *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), the clause protects those "who are peculiarly vulnerable to nonjudicial determinations of guilt." A quick survey of the case-law confirms this view: The clause has been invoked to rescue Confederates and Communists from congressional wrath.

And that is what makes the Bill of Attainder analysis so unusual in this context: The Baby Bells, represented by armies of lawyers and lobbyists, hardly fit anyone's notion of a helpless victim. Moreover, there is evidence in the record that the Baby Bells, by their own account, *prevailed* in the legislative process. While their apparent consent to the Special Provisions does not estop them from challenging the restrictions in this court, it certainly undercuts their claim to victimhood. As the majority notes, the Special Provisions were part of a larger *quid pro quo*.

But the Bill of Attainder Clause serves a dual purpose: Not only does it rescue individuals from trial-by-legislature, it also preserves the separation of powers. The

clause is a check on Congress's power to legislate; it forbids Congress from passing punitive laws that target individuals. Congress may, of course, pass laws conferring *benefits* on individuals, *see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995), but when it wishes to impose punishment, it must legislate in general terms and allow the judicial branch to decide which individuals have violated the laws and must be punished.

The Court explained the clause's role in preserving the separation of powers most thoroughly in *Brown*—an opinion the panel majority tars as "somewhat aberrant." The Court began its discussion by reviewing the history of the clause, describing it as a barrier "to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments." 381 U.S. at 444 (emphasis omitted). It then stated precisely why the statute, which imposed an employment bar on members of the Communist Party, violated the clause:

> In [enacting the statute] Congress has exceeded the authority granted it by the Constitution. The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics . . . .

Id. at 450.

The Court noted that Congress was free to pass laws weeding subversives out of the labor movement—only it had to do so through generally applicable legislation, otherwise it overstepped its constitutional bounds. In language directly applicable to the instant case, the Court

explained that Congress "cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals." *Id.* at 461.

Brown stands for the idea that the Bill of Attainder Clause protects not only individual liberty, but also the other branches of government. The clause, in other words, helps ensure that Congress does not encroach on the executive's or judiciary's turf. As the Court concluded, *id.* at 442, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function."

This is hardly a novel, twentieth-century interpretation. In one of the earliest bill-of-attainder cases, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810), Chief Justice Marshall explained that "[i]t is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." In fact, this understanding predates even the Marshall Court:

> Writings contemporary with the drafting of the Constitution express great concern lest the legislature assume the power to implement the total policy of government without the participation of the other branches, and support the thesis that the bill of attainder clause should be viewed as a limitation on legislatures fully as broad, and as necessary to the effective separation of powers, as that which has been imposed upon courts by article III.

Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 343 (1962) (cited with approval in *Brown*, 381 U.S. at 457 n.32). In this sense, even if the BOC's

somehow "consented" to Congress's imposing the Special Provisions, that consent is as irrelevant as is a litigant's "consenting" to subject-matter jurisdiction. Congress simply lacks the power to legislate in this way.

In enacting the Special Provisions, Congress adjudicated. It not only specified the sanction but also identified the specific corporations upon whom the sanction was to be levied—not coincidentally, the same corporations involved in the prior AT&T litigation. The Bill of Attainder Clause says that when Congress wishes to impose certain burdens historically deemed punitive, it can do so only through laws of general applicability. The actual *application* of these laws to specific parties must be left to the other branches of government. Congress runs afoul of the Bill of Attainder Clause when it enacts punitive legislation that targets certain entities—even where, as here, the punishment comes cloaked in the mantle of prophylactic economic regulation.

III.

The majority today opens a loophole in the Bill of Attainder Clause, allowing Congress to pass legislation that historically has been held unconstitutional. In doing so, the majority redefines our traditional understanding of the clause's mandate: Congress cannot single out an individual and deprive him of his life, liberty, or freedom to work. Because the Telecommunications Act's "Special Provisions" amount to a bill of attainder, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. TEXAS
WICHITA FALLS DIVISION

No. CIV. A. 7:97-CV-163-X

SBC COMMUNICATIONS, INC., *et al.*,
Plaintiffs,

U.S. WEST COMMUNICATIONS, INC.,
Plaintiff-Intervenor,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,
Defendants,

MCI TELECOMMUNICATIONS CORP., AT & T CORPORATION, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, NATIONAL CABLE TELEVISION ASSOCIATION, SPRINT COMMUNICATIONS CO. L.P., and TELECOMMUNICATIONS RESELLERS ASSOCIATION,
Defendant-Intervenors.

Dec. 31, 1997

MEMORANDUM OPINION
AND ORDER

KENDALL, District Judge.

This Court has been asked to decide the constitutionality of certain provisions of the Telecommunications Act of 1996 (the "Act"). Before the Court is plaintiffs'

Motion for Summary Judgment and defendants' Cross Motion for Summary Judgment. Plaintiffs[1] attack the constitutionality of Subtitle B of Title I of the Telecommunications Act of 1996, codified at 47 U.S.C. §§ 271, 272, 273, 274, and 275 and entitled "Part III—Special Provisions Concerning Bell Operating Companies," on the grounds that it is (a) a violation of principles of separation of powers, (b) a bill of attainder and (c) a violation of the equal protection clause. SBC also bases its constitutional challenge of § 274 on the First Amendment to the United States Constitution.

BACKGROUND

This case was initiated by eight Bell operating companies ("BOCs") so named and categorized because of their previous affiliation with American Telephone & Telegraph Company ("AT & T") prior to the court ordered break up of AT & T. The challenged statutes and this case have their genesis in the antitrust lawsuit brought by the United States against AT & T in 1974. This antitrust lawsuit was settled in 1982 when AT & T, an intervening defendant in this case, entered into a consent decree with the United States, the defendant here. A review of the history of that court action is appropriate.

In 1974, the Justice Department brought an antitrust lawsuit against AT & T alleging that AT & T had violated the Sherman Act by using its market power to bar entry into markets by other corporations. The lawsuit was settled through what became known as the Modified Final Judgment (the "MFJ"), which also became known as the AT & T Consent Decree. The AT & T Consent Decree required AT & T to divest itself of 24 BOCs by 1984.

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[1] Out of convenience and brevity, the Court will refer to all plaintiffs as "SBC" or "plaintiffs" including U.S. West Communications, Inc. Likewise the Court will refer to all defendants including the intervenors as "the FCC" or "defendants."

The AT & T Consent Decree imposed certain restrictions on the BOCs. For decades the BOCs were under the control of AT & T until the breakup wrought by the consent decree. In their territory what are now the BOCs often had state granted franchises to provide local exchange service. The consent decree maintained the monopoly status as to local exchange service, but barred certain activities that now make their way into the "Special Provisions" found in §§ 271-275. The 1996 Act, however, took away the state sanctioned monopoly protection for local exchange service, opened all local exchange carriers to competition, but by name singled out the BOCs so as to prevent them from engaging in long distance service, electronic publishing, and providing alarm services. In the consent decree, the BOCs were prohibited from providing telephone service between a point located inside a certain exchange area and any point outside that exchange area, which is referred to as inter local access and transport area or interLATA. The BOCs also were prohibited from providing information services, any non-telecommunications services, and from manufacturing telecommunications equipment. The prohibited information services included electronic publishing and alarm monitoring services. In 1991, the restrictions on information services were overturned and the BOCs were allowed to provide such services as electronic publishing and alarm monitoring.[2] The consent decree and its accompanying restrictions play a very important role in this case because they provide the foundation for the FCC's argument that the restrictions challenged by the plaintiffs do no more than replace the restrictions imposed by the AT & T Consent Decree. The relevancy, and imperfection, of the FCC's argument is revealed through further analysis of the parties' arguments and the challenged statutes.

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2 *United States v. Western Electric Co., Inc.*, 767 F.Supp. 308 (D.D.C.1991), *aff'd*, 993 F.2d 1572 (D.C.Cir.), *cert. denied*, 510 U.S. 984, 114 S.Ct. 487, 126 L.Ed.2d 438 (1993).

CHALLENGED PROVISIONS

On February 8, 1996, the President signed the Telecommunications Act of 1996 into law. Section 601(a)(1) of the Act expressly provided that the restrictions imposed by the AT & T Consent Decree would be replaced by the restrictions and obligations of the Act. The Act serves to open local exchanges to competition by imposing various obligations on local exchange carriers including the requirement that incumbent local exchange carriers assist competitors desiring to use their networks, and allow them to do so. Section 251(b) of the Act places numerous and onerous duties on all local exchange carriers designed to stimulate competition in and simplify entry into the local markets by the competitors of all local exchange carriers. Section 252 provides the guidelines for achieving certain of the duties imposed on the local exchange carriers by § 251.

Local telephone companies such as the plaintiffs are commonly referred to as local exchange carriers. Local exchange carriers provide various services including local telephone calls, short-haul calls, operator services, and advanced features such as call waiting, call forwarding and voice mail. Additionally, they provide exchange access services, which enable long distance carriers to use the local exchange carriers' facilities to originate and terminate long distance calls to end users.

Plaintiffs are not the only local exchange carriers. Hundreds of other local exchange carriers operate in the United States. GTE Corporation, Sprint Corporation, Frontier Corporation, Cincinnati Bell Telephone Company, and Southern New England Telephone Company are a few examples of significant sized local exchange carriers completely unaffiliated with the Bell operating companies.

The effect of the Telecommunications Act of 1996 is to expose incumbent local exchange carriers to competi-

tion through the elimination of any previous barriers to competition created by local laws or naturally arising from the local exchange carrier's exclusive control over their property. These restrictions are not the subject of the constitutional challenge brought by the plaintiffs in this Court. Instead, the plaintiffs are challenging the restrictions found in §§ 271-275 of the Act entitled "Special Provisions Concerning Bell Operating Companies." Plaintiffs argue it is not lawful or fair to take away the state sanctioned franchised protected status for local service while at the same time continuing to not allow only them to compete in other telephone business, particularly long distance. They contend that the proverbial carrot has been removed but they are still receiving the stick.

The Special Provisions found in §§ 271-275 apply solely to a BOC or any affiliate of a BOC. That term is defined in § 153(4) as twenty specific corporate entities [3] and their successors or assigns that provide wireline telephone exchange service. 47 U.S.C. § 153(4). As such the statutes in question are not laws of general application. SBC challenges § 271, which restricts the BOCs' entry into the long distance market, and § 274, which prohibits electronic publishing by BOCs through the use of basic telephone service for a period of four years. SBC

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[3] Section 153(4)(A) identifies the following as Bell operating companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U.S. West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, the Ohio Bell Telephone Company, the Pacific Telephone and Telegraph Company and Wisconsin Telephone Company.

also attacks the requirement of affiliates for particular lines of business and the restrictions against manufacturing and the provision of alarm monitoring services found in §§ 272, 273 and 275.

Section 271 prohibits a BOC from providing interLATA services unless the following requirements are met:

(A) Presence of a facilities-based competor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purposes of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the

> date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

47 U.S.C. § 271(c)(1)(A) and (B).

Additionally, the BOCs must satisfy what Congress has termed a "Competitive checklist," which contains fourteen requirements governing the BOCs' access and interconnection provided to other telecommunications carriers. Upon compliance with these prerequisites, the BOC is not done. Section 271(d) provides that a BOC then may apply with the Federal Communications Commission for authorization to provide interLATA services. 47 U.S.C. § 271(d)(1). Under § 271, the FCC is restricted from granting such authorization unless the BOC has met the requirements identified above in (c)(1)(A) or (B); the authorization is in accordance with § 272; and "the requested authorization is consistent with the public interest, convenience, and necessity." Of course, this last hoop to jump through is met when the FCC says it is met.

Section 272 requires the BOCs to establish a separate affiliate for manufacturing activities that are authorized

by the FCC under § 271(d); for origination of interLATA telecommunications services other than certain interLATA services, out-of-region services, previously authorized activities; and interLATA information services forbidden by §§ 271 and 273 of the Act. Section 273 prohibits the BOCs from manufacturing and providing telecommunications equipment for as long as they are prohibited from providing long distance services under § 271.

Section 274 prohibits the BOCs for a period of four years from February 8, 1996 from engaging in electronic publishing through use of its basic telephone service. "Electronic publishing" is defined as "the dissemination, provision, publication, or sale to an unaffiliated entity or persons, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information." 47 U.S.C. § 274(h). Finally, § 275 forbids the BOCs from engaging in alarm monitoring services for a period of five years from February 8, 1996.

DISCUSSION—BILL OF ATTAINDER

The Court first addresses SBC's argument that the Special Provisions constitute a bill of attainder. The defendant and intervenors contend that the Special Provisions are appropriate regulation, not legislative punishment as required to constitute an attainder. This is of course a judgment call based on the law and all the surrounding factual circumstances. Whether the legislation goes too far and punishes the legislative target (here the named BOCs only) is the very type of question that judicial review must answer. Judicial review of the constitutionality of an Act of Congress is indeed the gravest and most

delicate duty that an Article III judge is called on to perform. *Blodgett v. Holden*, 275 U.S. 142, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). However, such decisions are the judiciary's duty under our system of government.

SBC strongly urges that the singling out of specific corporations by name and burdening those corporations with such limitations as those created by §§ 271-275 necessarily constitutes a bill of attainder in violation of Article I, § 9, Clause 3, of the Constitution.[4] Although the

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[4] The Court will address briefly at this point a related argument, preliminary in nature and raised by the FCC, that the Bill of Attainder Clause does not apply to corporations. While it is true that not all constitutional rights afforded individuals are guaranteed to corporations, corporations enjoy most of the same constitutional guarantees as individuals, even those provisions that would appear inherently personal in nature. *See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (corporation has a First Amendment right to freedom of speech); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (corporation's property may not be seized without just compensation); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) (corporation may not be subjected to unreasonable searches and seizures); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) (corporation can plead former jeopardy); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (corporation is entitled to due process); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) (corporation is entitled to equal protection). Whether a constitutional right is available to corporations "depends on the nature, history, and purpose of the particular constitutional provision." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n. 14, 98 S.Ct. 1407, 1416 n. 14, 55 L.Ed.2d 707 (1978) (emphasis added).

The Court agrees with the plaintiffs that the protections afforded by the Bill of Attainder Clause apply to corporations. The nature of the Clause is not inherently personal. It is not difficult to see that corporations, like individuals, may find themselves at the mercy of a legislature attempting to assume the role of the judiciary. As the Supreme Court stated in *United States v. Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965), "the Bill of Attainder

Supreme Court has established criteria for determining whether a particular statute constitutes a bill of attainder, the Supreme Court has never addressed the precise issue before this Court: whether Congress may enact laws that single out by name specific business entities and restrict their ability to conduct lawful business, and do not do so for other similarly situated entities.[5]

A bill of attainder has been defined as "a legislative act which inflicts punishment without a judicial trial." *Cummings v. State of Missouri*, 71 U.S. 277, 323 (4 Wall.), 18 L.Ed. 356 (1866). A bill of attainder originally was associated with legislation that sentenced a named individual to death. However, Article I, § 9 also proscribes laws characterized as bills of pains and penalties, which inflict a punishment less than death. *United States v. Lovett*, 106 Ct.Cl. 856, 328 U.S. 303, 315, 66 S.Ct. 1073, 1078-79, 90 L.Ed. 1252 (1946) *citing Cummings*, 71 U.S. 277, 4 Wall. 277. As the Supreme Court has instructed, the Bill of Attainder Clause was intended to implement the separation of powers as well as reflect

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Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply—trial by legislature." 381 U.S. at 440, 85 S.Ct. at 1710.

It is well settled that corporations are subject to criminal law. They are often indicted, tried, convicted and sentenced under the Sentencing Guidelines. Given that a bill of attainder is trial by legislature, with penal consequences, the Court can think of no reason why the clause should be read so narrowly to exclude corporations.

[5] SBC took the position and Congress was informed as early as May 21, 1992 that legislation that singled out the BOCs alone for special disability violated separation of powers principles and specifically the Bill of Attainder Clause, Article I, § 9 of the Constitution. This opinion was expressed by Professor Laurence H. Tribe, probably the most respected Constitutional law scholar alive. See Laurence H. Tribe, *Comments on The Brooks Bill (H.R. 5096)—A Constitutional Perspective*, May 21, 1992, also made a part of the record in this case.

"the Framers' [of the Constitution] belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Brown*, 381 U.S. at 445, 85 S.Ct. at 1713.

Although historically the gamut of statutes and corresponding punishments deemed forbidden as bills of attainder has been limited, the list of punishments has broadened somewhat. In addition to the traditional legislative punishments considered unconstitutional—imprisonment, banishment, and confiscation of property—statutes preventing select individuals or groups from engaging in specified employments or vocations have been added to the list of impermissible sanctions. *Nixon v. Administrator of General Services*, 433 U.S. 425, 474, 97 S.Ct. 2777, 2806, 53 L.Ed.2d 867 (1977).

A review of Supreme Court precedent demonstrates that the Court rarely has held a statute to be unconstitutional as a bill of attainder. The defendants' argue that this fact militates against a finding that the questioned statutes are bills of attainder. However, the statutes and punishment before this Court are extraordinary, and in fact unprecedented. An analysis under the applicable standards for a bill of attainder show that this is clearly what the statutes are. The fact that such a court finding is rare is because it is rare for Congress to in essence declare by name someone guilty of an offense (here antitrust violations) and then set about to punish them by statute.

A statute is considered an unconstitutional bill of attainder when it (1) identifies a specific individual or group (2) inflicts punishment on that individual or group (3) without the benefit of a judicial trial. *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846, 104 S.Ct. 3348, 3351-52, 82 L.Ed.2d 632 (1984). The parties do not, and cannot, dispute that the specification element is met. The Special Provisions by

their very terms apply solely to the BOCs. Nor have the BOCs had any judicial trial for crimes they have committed or may commit. Thus, the real dispute centers on the issue of whether the company specific prohibitions found in §§ 271-275 constitute punishment for purposes of a bill of attainder, or, as the defendants contend, they are merely economic regulation.

The Supreme Court applies a three-step analysis in determining whether a law crosses the boundary between lawful regulation and impermissible punishment, therefore, is deemed a bill of attainder. The first step to making this determination is known as the historical test and involves a comparison of the punishment at hand to the type of sanctions historically found to constitute legislative punishment. *Nixon*, 433 U.S. at 475, 97 S.Ct. at 2806-07. SBC argues that Supreme Court precedent holding unconstitutional laws prohibiting individuals or groups from engaging in a particular profession apply equally to this case. The FCC urges that none of the circumstances present in the cases where the Supreme Court has found a law to be a bill of attainder are present in the case at hand. The FCC does not equate an individual's deprivation of his employment to the outlawing of participation in lawful business placed on SBC through the Special Provisions. In fact, the FCC urges this Court to find that the Special Provisions are not punitive because they merely replace the restrictions and conditions imposed on the BOCs under the Consent Decree, between AT & T and the United States, related court orders and administrative regulations which arose out of the antitrust litigation against AT & T.

Although the history of the Clause suggests that individuals have benefitted from the Bill of Attainder Clause, the Supreme Court has long stated that the clause applies to individual persons *and private groups. See e.g. Cummings*, 71 U.S. 277, 4 Wall. 277 (emphasis added—*See also* footnote 5 on this point). To glean from this language an intent of the Supreme Court to

apply the protections afforded under the Bill of Attainder Clause to a broader group than just individuals is wholly consistent with the purpose of the Clause. The Supreme Court has stated that the Bill of Attainder Clause is "not to be given a narrow historical reading," rather, it is "to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." *Brown*, 381 U.S. at 447, 85 S.Ct. at 1714.

Further, the list of unlawful Congressional sanctions is not limited solely to deprivations of life, liberty and property. *Cummings*, 71 U.S. at 320. In *Cummings*, the Supreme Court recognized the unlimited scope of punishments prohibited by the Bill of Attainder Clause stating:

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punshment.

71 U.S. at 320. The Supreme Court in *Nixon* again echoed this sentiment when it stated that "[o]ur treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." *Nixon*, 433 U.S. at 475, 97 S.Ct. at 2806.

Under a historical analysis, the burdens imposed on the BOCs by §§ 271-275 necessarily constitute punishment. Historically, the Supreme Court has forbidden legislation preventing individuals or groups from engaging in a profession or business as well as those laws that deprive them of rights previously enjoyed. The Special Provisions prevent the BOCs from engaging in a lawful business for what

the Court only can conclude were the sins of the parent, AT & T, or for what offenses Congress believes the BOCs may (without any evidence) commit in the future. This Court is not deterred by the fact that named business entities, not named individuals, are subjected to the sanctions imposed by the Special Provisions. Corporations, like individuals, are subject to punishment as has long been evidenced by the criminal laws of this country.

Sections 271-275 fail to set forth a generally applicable rule requiring all local exchange carriers to comply with their restrictions. *See Brown*, 381 U.S. at 446, 85 S.Ct. at 1713. The Special Provisions impose no slight burden on the BOCs as the FCC urges this Court to believe. Sections 271-275 foreclose the BOCs from immediate entry into very lucrative markets at a time when the telecommunications market is ever expanding and changing. The barriers to entry in the long-distance and alarm monitoring services markets, the manufacturing restrictions, and the prohibitions against electronic publishing prescribed by §§ 271-275 constitute punishment as that term is applied to a bill of attainder.

To put the BOCs' plight in perspective, all other telecommunications carriers, including all other non specified similarly situated local exchange carriers, may offer any of the services forbidden to the BOCs. This allows other telecommunications carriers that are in competition with the BOCs to offer "one-stop shopping" for customers' needs. No longer will consumers need to purchase local service through one carrier and long distance through another carrier. The inability of the BOCs to provide their customers with all of their telecommunications needs greatly increases the likelihood of enormous losses of existing business in addition to the economic losses the BOCs will suffer by their inability to enter various telecommunications markets. While the sanctions imposed by the Special Provisions do not result in imprisonment

or banishment of the BOCs, they punish the BOCs in the only manner possible for a corporation—financially.[6]

Indeed, §§ 271-275 presume the guilt of the BOCs as monopolists and assess the punishment without the benefit of a judicial trial. The Bill of Attainder Clause was designed to safeguard against this very conduct—trial by legislature. *Brown*, 381 U.S. at 442, 85 S.Ct. at 1711-12. While Congress may prescribe general rules governing society, it is the function of the judiciary to apply those rules. *Id.* at 446, 85 S.Ct. at 1713 *citing Fletcher v. Peck*, 10 U.S. 87, (6 Cranch) 3 L.Ed. 162 (1810). Through the Special Provisions, Congress has encroached on the authority of the judiciary by applying the general rules prescribed in §§ 251-252 and then adjudging the BOCs guilty of non-compliance, guilty of anticompetitive conduct, and assessing their punishment to be foreclosure of various lucrative and legal business activities otherwise available to all other telecommunications carriers.

The FCC argues that the restrictions imposed by the Special Provisions institute no additional restrictions than those imposed on the BOCs by the AT & T Consent Decree. According to the FCC, §§ 271-275 "merely revamp" the restrictions on the BOCs and their affiliates imposed by the consent decree and "move it from the judicial and executive realm to the legislative realm." Therein lies the imperfection of their argument. The Bill of Attainder Clause is designed to implement separation of powers and to prevent this very conduct that the FCC contends validates Congress' enactment of the Special Provisions. While a court can adjudicate the rights or liabilities of the BOCs and impose corresponding sanc-

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[6] How does one punish a corporation? You cannot tie it to the whipping post or roll the corporate charter up and place it in jail. The only way you ever punish a corporation is by affecting its bottom line and that is precisely what §§ 271-275 do to the named BOCs.

tions—or formulate a consent decree as in the case of AT & T—Congress has not been granted such authority. Furthermore, even a court may only do so after notice, evidence, confrontation and finally an adjudication by a politically neutral judge or jury.

Additionally, the Special Provisions take from the BOCs certain rights previously enjoyed—a historically impermissible sanction. *See Cummings*, 71 U.S. at 320. True, the BOCs were subject to restrictions under the consent decree, including access to the long distance market. However, a number of the restrictions imposed on the BOCs through the consent decree were eliminated years before the enactment of the Act including the information services ban, which encompassed both alarm monitoring and electronic publishing. Although once liberated from these restrictions, Congress has reinstated them solely against the BOCs through the Special Provisions.

The FCC suggests that the Special Provisions cannot be punitive because they are not permanent or inescapable. In support of its contention, the FCC cites *Selective Service Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984), which addressed the constitutionality of § 12(f) of the Military Selective Service Act. The challenged statute in that case denied any form of assistance provided under Title IV of the Higher Education Act to those men who failed to register for the draft as required by the Military Selective Service Act. *Id.* at 844, 104 S.Ct. at 3350-51. However, the statute allowed those failing to timely register to qualify for aid by filing late. *Id.* at 850, 104 S.Ct. at 3353-54. The Supreme Court held that the statute was not a bill of attainder stating: "[a] statute that leaves open perpetually the possibility of qualifying for aid does not fall within the historical meaning of forbidden legislative punishment." *Id.* at 853, 104 S.Ct. at 3355.

This Court is not persuaded that the Supreme Court's decision in *Selective Service* signifies that the constitutionality of a statute under the Bill of Attainder Clause will be dependent on the inclusion or exclusion of an escape clause. To the contrary, the Court in *Brown* noted that an escape clause is not an "absolute prerequisite to a finding of attainder." 381 U.S. at 458 n. 32, 85 S.Ct. at 1720 n. 32. The Court further stated that "[s]uch an absolute rule would have flown in the face of explicit precedent." *Id.* Moreover, the challenged statute in *Selective Service* potentially deprived male citizens, *all male citizens*, in the appropriate age range of government benefits—not their ability to participate in particular employment or business, as here. The Supreme Court recognized this distinction stating: " 'the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed.' " *Selective Service*, 468 U.S. at 853, 104 S.Ct. at 3355 *citing Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435 (1960).

The Special Provisions impose affirmative disabilities on the BOCs. The "Competitive checklist" identifies fourteen duties alone. Sections 271-275 strip the BOCs of their ability to enter new markets and tie their hands while their competitors such as GTE, AT & T, and MCI take their punches. These provisions impose burdensome requirements that must be met before the BOCs even can request to compete with other telecommunications carriers in long distance, alarm monitoring services, manufacturing, and electronic publishing. But perhaps most significantly, it is conceivable that these requirements may never be met by the BOCs. Not only is the "Competitive checklist" in § 271 extremely onerous, the process for applying to have the numerous restrictions removed is tainted with indefiniteness and replete with arbitrary standards.

Although §§ 271-275 constitute a bill of attainder under the historical analysis, the punitive nature of the

Special Provisions is reinforced through an application of the functional test enunciated by the Supreme Court. The functional test involves "analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475, 97 S.Ct. at 2806-07. "Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." *Id.*

The FCC identifies the otherwise nonpunitive purposes of the Special Provisions as "establishing telecommunications policy, increasing competition in markets to benefit the consumer, preventing anticompetitive activities." Preventing anticompetitive activities necessarily implies that if the restrictions imposed by the Special Provisions were lifted, the BOCs would engage in anticompetitive conduct. Once again, the Special Provisions presume the BOCs' guilt. If establishing the telecommunications market and increasing competition were the goals of Congress, those ends have been addressed through other provisions of the Act such as § 251, which applies generally to all telecommunications carriers, and more specifically to *all* local exchange carriers.

The functional reality of the Special Provisions is that they serve as punishment for the BOCs' presumed anticompetitive conduct. Congress independently has adjudicated the BOCs guilty of antitrust violations. Moreover, Congress has determined that the BOCs are guilty of an unlawful monopolization of the long distance market before the BOCs even have entered that market. The evils that Congress is predicting and attempting to prevent amply are addressed by the antitrust laws of this country if and when their use becomes necessary. And if they do they will be applied in a court of law.

The FCC further urges that the restrictions found in the Special Provisions were not intended to punish prior

bad behavior of the BOCs, but are based "on a realistic appraisal of the incentives" of the BOCs to disadvantage competitors. In essence the argument is that "maybe they weren't criminals in the past but we know they will be in the future." Punishment is not restricted to past deeds. *Brown*, 381 U.S. at 458-59, 85 S.Ct. at 1720-21. Impermissible sanctions may include deprivations designed to prevent future misconduct. *Id.* Thus, that Congress is basing its restrictions in §§ 271-275 on a "predictive determination" offers no salvation for the FCC's argument. If anything it helps make the case for the restrictions being a bill of attainder.

The final test for determining whether a statute constitutes a bill of attainder is the motivational test, which inquires into "whether the legislative record evinces a congressional intent to punish." *Nixon*, 433 U.S. at 478, 97 S.Ct. at 2808. Although an explicit demonstration of punitive legislative intent is unnecessary to a bill of attainder, the Supreme Court has turned to the legislative history of challenged statutes as some evidence in analyzing their constitutionality. *Nixon*, 433 U.S. at 480, 97 S.Ct. at 2809. The references to the AT & T Consent Decree and the alleged antitrust violations of AT & T are not so innocent as the FCC urges this Court to believe. Indeed, the consent decree was born out of alleged antitrust violations by AT & T. The result of their alleged unlawful conduct was the numerous restrictions imposed by the decree. Those same restrictions are imposed now on the BOCs through the Special Provisions. AT & T's prior allegedly anticompetitive conduct forms the very basis of the Special Provisions. The Court can reach no other conclusion than that Congress intended §§ 271-275 to punish the BOCs for their former parent AT & T's transgressions over two decades ago or for crimes yet to be committed by the BOCs.

CONCLUSION

Sections 271-275 of the Telecommunications Act of 1996 constitute a bill of attainder and thus are unconstitutional. If the sections were statutes of general applicability this Court's ruling would be different. Having so found the Court need not and does not reach the plaintiffs' equal protection and first amendment arguments. The plaintiffs' Motion for Summary Judgment is GRANTED and the defendants' Cross-Motion for Summary Judgment is DENIED.

SO ORDERED.

APPENDIX C

[Filed Feb. 11, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

Civil Action No. 7:97-CV-163-X

SBC COMMUNICATIONS, INC., *et al.*,
Plaintiffs/Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants/Intervenors.

FINAL JUDGMENT

On December 31, 1997 the Court issued its Memorandum Opinion and Order holding Sections 271-275, inclusive, of the Telecommunications Act of 1996 unconstitutional. Those provisions, singling out the Plaintiff and Plaintiff-Intervenors by name, constitute a violation of separation of powers principles and are bills of attainder, and are thus unconstitutional.

The Court did not reach the equal protection and first amendment claims. The Court further did not, and here does not, find any other provision of the Act unconstitutional. The Court expressly holds and decrees that the unconstitutional "Special Provisions" are severable from the remainder of the Telecommunications Act of 1996 and the Communications Act of 1934.

THEREFORE, it is the ORDER, JUDGMENT and DECREE of this Court that Sections 271, 272, 273, 274, and 275 of the Telecommunications Act of 1996 are unconstitutional. Costs shall be borne by the party incurring them.

Signed this 11th day of February, 1998.

/s/ Joe Kendall
JOE KENDALL
United States District Judge

APPENDIX D

[Filed Feb. 11, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

Civil Action No. 7:97-CV-163-X

SBC COMMUNICATIONS, INC., *et al.*,
Plaintiffs/Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Defendants/Intervenors.

ORDER GRANTING STAY AND DENYING INJUNCTION

On December 31, 1997 this Court entered its Memorandum Opinion and Order and today, February 11, 1998 entered its Final Judgment declaring Sections 271 through 275, inclusive, of the Telecommunications Act of 1996 unconstitutional as violative of the separation of powers principles and bill of attainder provision of the United States Constitution. On January 21, 1998 the Federal Defendant-Intervenors filed Notices of Appeal and all defendants have requested a stay pending appeal as well as injunctive relief. The Motion for Stay is granted.

The defendants have sought from the Court an injunction against the Plaintiffs to bar them from preparing to or actually selling long distance telephone service to con-

sumers. The defendants have failed to make the showing necessary for injunctive relief.

The defendants have not shown a likelihood of success on the merits. Despite all the noise, spin and reams of papers, *legally* this case isn't so much about Milt Friedman vs. Kenneth Galbraith as it is about James Madison. The "Special Provisions" violate separation of powers principles.

There is an adequate remedy at law: It is an appeal. Furthermore, there has been no showing of irreparable harm to anyone if an injunction is not entered, or indeed even if the stay is lifted. Long distance telephone service can be changed with a telephone call of about 60 to 120 seconds duration.

The Court specifically declines to enjoin the Plaintiff and Intervening Plaintiffs (Bell Operating Companies or "Baby Bells") from preparing to sell or selling long distance service to consumers who freely choose to purchase such services from them.

SO ORDERED this 11th day of February, 1998.

/s/ Joe Kendall
JOE KENDALL
United States District Judge

APPENDIX E

[49 U.S.C. § 153(4)]

STATUTORY PROVISIONS

The Telecommunications Act of 1996 provides in 47 U.S.C.:

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

(4) Bell operating company

The term "Bell operating company"—

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, US West Communications Company, South Central, Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

(B) includes any successor or assign of any such company that provides wireline telephone exchange service; but

(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).

PART II—DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditons or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and tele-

phone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier,

interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier pro-

vides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

[47 U.S.C. § 251]

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the

aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same

equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and

provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petiton and the response, if any, by imposing appropriate conditions as requred to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditons upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

[47 U.S.C. § 252]

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require car-

riers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunication services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommuncations carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

[47 U.S.C. § 252]

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission, shall issue an order preempting the State commission's jurisdiction of that proceeding or matter

within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing

or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on

telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

§ 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

[47 U.S.C. § 253]

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to pro-

vide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

Part III—Special Provisions Concerning Bell Operating Companies

§ 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

[47 U.S.C. § 271]

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the

Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilties or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and inter-

[47 U.S.C. § 271]

connection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subpargraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

[47 U.S.C. § 271]

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with

the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

[47 U.S.C. § 271]

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996,

whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) Definition of incidental interLATA services

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

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(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilties to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of

subsection (g)(1) of this section are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section—

(1) In-region State

The term "in-region State" means a State in which a Bell operating company or any of its affliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms "video programming service" and "other programming services" have the same meanings as such terms have under section 522 of this title.

[47 U.S.C. § 272]

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the inter-LATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

§ 272. Separate affiliate; safeguards

(a) Separate affiliate required for competitive activities

(1) In general

A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) of this title may not provide any service described in paragraph (2) unless it provides that service through one or more affiliates that—

(A) are separate from any operating company entity that is subject to the requirements of section 251(c) of this title; and

(B) meet the requirements of subsection (b) of this section.

(2) Services for which a separate affiliate is required

The services for which a separate affiliate is required by paragraph (1) are:

(A) Manufacturing activities (as defined in section 273(h) of this title).

(B) Origination of interLATA telecommunications services, other than—

(i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g) of this title;

(ii) out-of-region services described in section 271(b)(2) of this title; or

(iii) previously authorized activities described in section 271(f) of this title.

(C) InterLATA information services, other than electronic publishing (as defined in section 274(h) of this title) and alarm monitoring services (as defined in section 275(e) of this title).

(b) Structural and transactional requirements

The separate affiliate required by this section—

(1) shall operate independently from the Bell operating company;

(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

(3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

(5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an

arm's length basis with any such transactions reduced to writing and available for public inspection.

(c) Nondiscrimination safeguards

In its dealings with its affiliate described in subsection (a) of this section, a Bell operating company—

(1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and

(2) shall account for all transactions with an affiliate described in subsection (a) of this section in accordance with accounting principles designated or approved by the Commission.

(d) Biennial audit

(1) General requirement

A company required to operate a separate affiliate under this section shall obtain and pay for a joint Federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b) of this section.

(2) Results submitted to commission; State commissions

The auditor described in paragraph (1) shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection. Any party may submit comments on the final audit report.

(3) Access to documents

For purposes of conducting audits and reviews under this subsection—

(A) the independent auditor, the Commission, and the State commission shall have access to the financial accounts and records of each company and of its affiliates necessary to verify transactions conducted with that company that are relevant to the specific activities permitted under this section and that are necessary for the regulation of rates;

(B) the Commission and the State commission shall have access to the working papers and supporting materials of any auditor who performs an audit under this section; and

(C) the State commission shall implement appropriate procedures to ensure the protection of any proprietary information submitted to it under this section.

(e) Fulfillment of certain requests

A Bell operating company and an affiliate that is subject to the requirements of section 251(c) of this title

(1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates;

(2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) of this section unless such facilities, services, or information are made available to other providers of

interLATA services in that market on the same terms and conditions;

(3) shall charge the affiliate described in subsection (a) of this section, or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and

(4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

(f) Sunset

(1) Manufacturing and long distance

The provisions of this section (other than subsection (e) of this section) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d) of this title, unless the Commission extends such 3-year period by rule or order.

(2) InterLATA information services

The provisions of this section (other than subsection (e) of this section) shall cease to apply with respect to the interLATA information services of a Bell operating company 4 years after February 8,

1996, unless the Commission extends such 4-year period by rule or order.

(3) Preservation of existing authority

Nothing in this subsection shall be construed to limit the authority of the Commission under any other section of this chapter to prescribe safeguards consistent with the public interest, convenience, and necessity.

(g) Joint marketing

(1) Affiliate sales of telephone exchange services

A Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.

(2) Bell operating company sales of affiliate services

A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d) of this title.

(3) Rule of construction

The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c) of this section.

(h) Transition

With respect to any activity in which a Bell operating company is engaged on February 8, 1996, such company

shall have one year from such date of enactment to comply with the requirements of this section.

§ 273. Manufacturing by Bell operating companies

(a) Authorization

A Bell operating company may manufacture and provide telecommunications equipment, and manufacture customer premises equipment, if the Commission authorizes that Bell operating company or any Bell operating company affiliate to provide interLATA services under section 271(d) of this title, subject to the requirements of this section and the regulations prescribed thereunder, except that neither a Bell operating company nor any of its affiliates may engage in such manufacturing in conjunction with a Bell operating company not so affiliated or any of its affiliates.

(b) Collaboration; research and royalty agreements

(1) Collaboration

Subsection (a) of this section shall not prohibit a Bell operating company from engaging in close collaboration with any manufacturer of customer premises equipment or telecommunications equipment during the design and development of hardware, software, or combinations thereof related to such equipment.

(2) Certain research arrangements; royalty agreements

Subsection (a) of this section shall not prohibit a Bell operating company from—

(A) engaging in research activities related to manufacturing, and

(B) entering into royalty agreements with manufacturers of telecommunications equipment.

(c) Information requirements

(1) Information on protocols and technical requirements

Each Bell operating company shall, in accordance with regulations prescribed by the Commission, maintain and file with the Commission full and complete information with respect to the protocols and technical requirements for connection with and use of its telephone exchange service facilities. Each such company shall report promptly to the Commission any material changes or planned changes to such protocols and requirements, and the schedule for implementation of such changes or planned changes.

(2) Disclosure of information

A Bell operating company shall not disclose any information required to be filed under paragraph (1) unless that information has been filed promptly, as required by regulation by the Commission.

(3) Access by competitors to information

The Commission may prescribe such additional regulations under this subsection as may be necessary to ensure that manufacturers have access to the information with respect to the protocols and technical requirements for connection with and use of telephone exchange service facilities that a Bell operating company makes available to any manufacturing affiliate or any unaffiliated manufacturer.

(4) Planning information

Each Bell operating company shall provide, to interconnecting carriers providing telephone exchange service, timely information on the planned deployment of telecommunications equipment.

[47 U.S.C. § 273]

(d) Manufacturing limitations for standard-setting organizations

(1) Application to Bell Communications Research or manufacturers

Bell Communications Research, Inc., or any successor entity or affiliate—

(A) shall not be considered a Bell operating company or a successor or assign of a Bell operating company at such time as it is no longer an affiliate of any Bell operating company; and

(B) notwithstanding paragraph (3), shall not engage in manufacturing telecommunications equipment or customer premises equipment as long as it is an affiliate of more than 1 otherwise unaffiliated Bell operating company or successor or assign of any such company.

Nothing in this subsection prohibits Bell Communications Research, Inc., or any successor entity, from engaging in any activity in which it is lawfully engaged on February 8, 1996. Nothing provided in this subsection shall render Bell Communications Research, Inc., or any successor entity, a common carrier under this subchapter. Nothing in this subsection restricts any manufacturer from engaging in any activity in which it is lawfully engaged on February 8, 1996.

(2) Proprietary information

Any entity which establishes a standards for telecommunications equipment or customer premises equipment, or generic network requirements for such equipment, or certifies telecommunications equipment or customer premises equipment, shall be prohibited from releasing or otherwise using any proprietary in-

formation, designated as such by its owner, in its possession as a result of such activity, for any purpose other than purposes authorized in writing by the owner of such information, even after such entity ceases to be so engaged.

(3) Manufacturing safeguards

(A) Except as prohibited in paragraph (1), and subject to paragraph (6), any entity which certifies telecommunications equipment or customer premises equipment manufactured by an unaffiliated entity shall only manufacture a particular class of telecommunications equipment or customer premises equipment for which it is undertaking or has undertaken, during the previous 18 months, certification activity for such class of equipment through a separate affiliate.

(B) Such separate affiliate shall—

(i) maintain books, records, and accounts separate from those of the entity that certifies such equipment, consistent with generally acceptable accounting principles;

(ii) not engage in any joint manufacturing activities with such entity; and

(iii) have segregated facilities and separate employees with such entity.

(C) Such entity that certifies such equipment shall—

(i) not discriminate in favor of its manufacturing affiliate in the establishment of standards, generic requirements, or product certification;

(ii) not disclose to the manufacturing affiliate any proprietary information that has been received at any time from an unaffiliated manu-

facturer, unless authorized in writing by the owner of the information; and

(iii) not permit any employee engaged in product certification for telecommunications equipment or customer premises equipment to engage jointly in sales or marketing of any such equipment with the affiliated manufacturer.

(4) Standard-setting entities

Any entity that is not an accredited standards development organization and that establishes industry-wide standards for telecommunications equipment or customer premises equipment, or industry-wide generic network requirements for such equipment, or that certifies telecommunications equipment or customer premises equipment manufactured by an unaffiliated entity, shall—

(A) establish and publish any industry-wide standard for, industry-wide generic requirement for, or any substantial modification of an existing industry-wide standard or industry-wide generic requirement for, telecommunications equipment, or customer premises equipment only in compliance with the following procedure—

(i) such entity shall issue a public notice of its consideration of a proposed industry-wide standard or industry-wide generic requirement;

(ii) such entity shall issue a public invitation to interested industry parties to fund and participate in such efforts on a reasonable and nondiscriminatory basis, administered in such a manner as not to unreasonably exclude any interested industry party;

(iii) such entity shall publish a text for comment by such parties as have agreed to participate in the process pursuant to clause (ii), provide such parties a full opportunity to submit comments, and respond to comments from such parties;

(iv) such entity shall publish a final text of the industry-wide standard or industry-wide generic requirement, including the comments in their entirety, of any funding party which requests to have its comments so published; and

(v) such entity shall attempt, prior to publishing a text for comment, to agree with the funding parties as a group on a mutually satisfactory dispute resolution process which such parties shall utilize as their sole recourse in the event of a dispute on technical issues as to which there is disagreeemnt between any funding party and the entity conducting such activities, except that if no dispute resolution process is agreed to by all the parties, a funding party may utilize the dispute resolution procedures established pursuant to paragraph (5) of this subsection;

(B) engage in product certification for telecommunications equipment or customer premises equipment manufactured by unaffiliated entities only if—

(i) such activity is performed pursuant to published criteria;

(ii) such activity is performed pursuant to auditable criteria; and

(iii) such activity is performed pursuant to available industry-accepted testing methods and standards, where applicable, unless otherwise agreed upon by the parties funding and performing such activity;

(C) not undertake any actions to monopolize or attempt to monopolize the market for such services; and

(D) not preferentially treat its own telecommunications equipment or customer premises equipment, or that of its affiliate, over that of any other entity in establishing and publishing industry-wide standards or industry-wide generic requirements for, and in certification of, telecommunications equipment and customer premises equipment.

(5) Alternate dispute resolution

Within 90 days after February 8, 1996, the Commission shall prescribe a dispute resolution process to be utilized in the event that a dispute resolution process is not agreed upon by all the parties when establishing and publishing any industry-wide standard or industry-wide generic requirement for telecommunications equipment or customer premises equipment, pursuant to paragraph (4)(A)(v). The Commission shall not establish itself as a party to the dispute resolution process. Such dispute resolution process shall permit any funding party to resolve a dispute with the entity conducting the activity that significantly affects such funding party's interests, in an open, nondiscriminatory, and unbiased fashion, within 30 days after the filing of such dispute. Such disputes may be filed within 15 days after the date the funding party receives a response to its comments from the entity conducting the ac-

tivity. The Commission shall establish penalties to be assessed for delays caused by referral of frivolous disputes to the dispute resolution process.

(6) Sunset

The requirements of paragraphs (3) and (4) shall terminate for the particular relevant activity when the Commission determines that there are alternative sources of industry-wide standards, industry-wide generic requirements, or product certification for a particular class of telecommunications equipment or customer premises equipment available in the United States. Alternative sources shall be deemed to exist when such sources provide commercially viable alternatives that are providing such services to customers. The Commission shall act on any application for such a determination within 90 days after receipt of such application, and shall receive public comment on such application.

(7) Administration and enforcement authority

For the purposes of administering this subsection and the regulations prescribed thereunder, the Commission shall have the same remedial authority as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier subject to this chapter.

(8) Definitions

For purposes of this subsection:

(A) The term "affiliate" shall have the same meaning as in section 153 of this title, except that, for purposes of paragraph (1)(B)—

(i) an aggregate voting equity interest in Bell Communications Research, Inc., of

at least 5 percent of its total voting equity, owned directly or indirectly by more than 1 otherwise unaffiliated Bell operating-company, shall constitute an affiliate relationship; and

(ii) a voting equity interest in Bell Communications Research, Inc., by any otherwise unaffiliated Bell operating company of less than 1 percent of Bell Communications Research's total voting equity shall not be considered to be an equity interest under this paragraph.

(B) The term "generic requirement" means a description of acceptable product attributes for use by local exchange carriers in establishing product specifications for the purchase of telecommunications equipment, customer premises equipment, and software integral thereto.

(C) The term "industry-wide" means activities funded by or performed on behalf of local exchange carriers for use in providing wireline telephone exchange service whose combined total of deployed access lines in the United States constitutes at least 30 percent of all access lines deployed by telecommunications carriers in the United States as of February 8, 1996.

(D) The term "certification" means any technical process whereby a party determines whether a product, for use by more than one local exchange carrier, conforms with the specified requirements pertaining to such product.

(E) The term "accredited standards development organization" means an entity composed of industry members which has been accredited

by an institution vested with the responsibility for standards accreditation by the industry.

(e) Bell operating company equipment procurement and sales

(1) Nondiscrimination standards for manufacturing

In the procurement or awarding of supply contracts for telecommunications equipment, a Bell operating company, or any entity acting on its behalf, for the duration of the requirement for a separate subsidiary including manufacturing under this chapter—

(A) shall consider such equipment, produced or supplied by unrelated persons; and

(B) may not discriminate in favor of equipment produced or supplied by an affiliate or related person.

(2) Procurement standards

Each Bell operating company or any entity acting on its behalf shall make procurement decisions and award all supply contracts for equipment, services, and software on the basis of an objective assessment of price, quality, delivery, and other commercial factors.

(3) Network planning and design

A Bell operating company shall, to the extent consistent with the antitrust laws, engage in joint network planning and design with local exchange carriers operating in the same area of interest. No participant in such planning shall be allowed to delay the introduction of new technology or the deployment of facilities to provide telecommunications serv-

ices, and agreement with such other carriers shall not be required as a prerequisite for such introduction or deployment.

(4) Sales restrictions

Neither a Bell operating company engaged in manufacturing nor a manufacturing affiliate of such a company shall restrict sales to any local exchange carrier of telecommunications equipment, including software integral to the operation of such equipment and related upgrades.

(5) Protection of proprietary information

A Bell operating company and any entity it owns or otherwise controls shall protect the proprietary information submitted for procurement decisions from release not specifically authorized by the owner of such information.

(f) Administration and enforcement authority

For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to any Bell operating company or any affiliate thereof as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier subject to this chapter.

(g) Additional rules and regulations

The Commission may prescribe such additional rules and regulations as the Commission determines are necessary to carry out the provisions of this section, and otherwise to prevent discrimination and cross-subsidization in a Bell operating company's dealings with its affiliate and with third parties.

(h) Definition

As used in this section, the term "manufacturing" has the same meaning as such term has under the AT&T Consent Decree.

§ 274. Electronic publishing by Bell operating companies

(a) Limitations

No Bell operating company or any affiliate may engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, except that nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture operated in accordance with this section from engaging in the provision of electronic publishing.

(b) Separated affiliate or electronic publishing joint venture requirements

A separated affiliate or electronic publishing joint venture shall be operated independently from the Bell operating company. Such separated affiliate or joint venture and the Bell operating company with which it is affiliated shall—

(1) maintain separate books, records, and accounts and prepare separate financial statements;

(2) not incur debt in a manner that would permit a creditor of the separated affiliate or joint venture upon default to have recourse to the assets of the Bell operating company;

(3) carry out transactions (A) in a manner consistent with such independence, (B) pursuant to written contracts or tariffs that are filed with the Commission and made publicly available, and (C) in

a manner that is auditable in accordance with generally accepted auditing standards;

(4) value any assets that are transferred directly or indirectly from the Bell operating company to a separated affiliate or joint venture, and record any transactions by which such assets are transferred, in accordance with such regulations as may be prescribed by the Commission or a State commission to prevent improper cross subsidies;

(5) between a separated affiliate and a Bell operating company—

(A) have no officers, directors, and employees in common after the effective date of this section; and

(B) own no property in common;

(6) not use for the marketing of any product or service of the separated affiliate or joint venture, the name, trademarks, or service marks of an existing Bell operating company except for names, trademarks, or service marks that are owned by the entity that owns or controls the Bell operating company;

(7) not permit the Bell operating company—

(A) to perform hiring or training of personnel on behalf of a separated affiliate;

(B) to perform the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section; or

(C) to perform research and development on behalf of a separated affiliate;

(8) each have performed annually a compliance review—

(A) that is conducted by an independent entity for the purpose of determining compliance during the preceding calendar year with any provision of this section; and

(B) the results of which are maintained by the separated affiliate or joint venture and the Bell operating company for a period of 5 years subject to review by any lawful authority; and

(9) within 90 days of receiving a review described in paragraph (8), file a report of any exceptions and corrective action with the Commission and allow any person to inspect and copy such report subject to reasonable safeguards to protect any proprietary information contained in such report from being used for purposes other than to enforce or pursue remedies under this section.

(c) Joint marketing

(1) In general

Except as provided in paragraph (2)—

(A) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate; and

(B) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing.

[47 U.S.C. § 274]

(2) Permissible joint activities

(A) Joint telemarketing

A Bell operating company may provide inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher: Provided, That if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms.

(B) Teaming arrangements

A Bell operating company may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher if (i) the Bell operating company only provides facilities, services, and basic telephone service information as authorized by this section, and (ii) the Bell operating company does not own such teaming or business arrangement.

(C) Electronic publishing joint ventures

A Bell operating company or affiliate may participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not a Bell operating company, affiliate, or separated affiliate to provide electronic publishing services, if the Bell operating company or affiliate has not more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the

gross revenues under a revenue sharing or royalty agreement in any electronic publishing joint venture. Officers and employees of a Bell operating company or affiliate participating in an electronic publishing joint venture may not have more than 50 percent of the voting control over the electronic publishing joint venture. In the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize the Bell operating company or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 percent. A Bell operating company participating in an electronic publishing joint venture may provide promotion, marketing, sales, or advertising personnel and services to such joint venture.

(d) Bell operating company requirement

A Bell operating company under common ownership or control with a separated affiliate or electronic publishing joint venture shall provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing.

(e) Private right of action

(1) Damages

Any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may file

a complaint with the Commission or bring suit as provided in section 207 of this title, and such Bell operating company, affiliate, or separated affiliate shall be liable as provided in section 206 of this title; except that damages may not be awarded for a violation that is discovered by a compliance review as required by subsection (b)(7) of this section and corrected within 90 days.

(2) Cease and desist orders

In addition to the provisions of paragraph (1), any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may make application to the Commission for an order to cease and desist such violation or may make application in any district court of the United States of competent jurisdiction for an order enjoining such acts or practices or for an order compelling compliance with such requirement.

(f) Separated affiliate reporting requirement

Any separated affiliate under this section shall file with the Commission annual reports in a form substantially equivalent to the Form 10-K required by regulations of the Securities and Exchange Commission.

(g) Effective dates

(1) Transition

Any electronic publishing service being offered to the public by a Bell operating company or affiliate on February 8, 1996, shall have one year from February 8, 1996, to comply with the requirements of this section.

(2) Sunset

The provisions of this section shall not apply to conduct occurring after 4 years after February 8, 1996.

(h) Definition of electronic publishing

(1) In general

The term "electronic publishing" means the dissemination, provision, publication, or sale to an unaffiliated entity or person, of any one or more of the following: news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructural, technical, professional, trade, or other literary materials; or other like or similar information.

(2) Exceptions

The term "electronic publishing" shall not include the following services:

(A) Information access, as that term is defined by the AT&T Consent Decree.

(B) The transmission of information as a common carrier.

(C) The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services,

which do not affect the presentation of such electronic publishing services to users.

(D) Voice storage and retrieval services, including voice messaging and electronic mail services.

(E) Data processing or transaction processing services that do not involve the generation or alteration of the content of information.

(F) Electronic billing or advertising of a Bell operating company's regulated telecommunications services.

(G) Language translation or data format conversion.

(H) The provision of information necessary for the management, control, or operation of a telephone company telecommunications system.

(I) The provision of directory assistance that provides names, addresses, and telephone numbers and does not include advertising.

(J) Caller identification services.

(K) Repair and provisioning databases and credit card and billing validation for telephone company operations.

(L) 911-E and other emergency assistance databases.

(M) Any other network service of a type that is like or similar to these network services and that does not involve the generation or alteration of the content of information.

(N) Any upgrades to these network services that do not involve the generation or alteration of the content of information.

(O) Video programming or full motion video entertainment on demand.

(i) Additional definitions

As used in this section—

(1) The term "affiliate" means any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a Bell operating company. Such term shall not include a separated affiliate.

(2) The term "basic telephone service" means any wireline telephone exchange service, or wireline telephone exchange service facility, provided by a Bell operating company in a telephone exchange area, except that such term does not include—

(A) a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984, or

(B) a commercial mobile service

(3) The term "basic telephone service information" means network and customer information of a Bell operating company and other information acquired by a Bell operating company as a result of its engaging in the provision of basic telephone service.

(4) The term "control" has the meaning that it has in 17 C.F.R. 240.12b-2, the regulations promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or any successor provision to such section.

[47 U.S.C. § 274]

(5) The term "electronic publishing joint venture" means a joint venture owned by a Bell operating company or affiliate that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(6) The term "entity" means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures.

(7) The term "inbound telemarking" means the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.

(8) The term "own" with respect to an entity means to have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement.

(9) The term "separated affiliate" means a corporation under common ownership or control with a Bell operating company that does not own or control a Bell operating company and is not owned or controlled by a Bell operating company and that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(10) The term "Bell operating company" has the meaning provided in section 153 of this title, except that such term includes any entity or corporation that is owned or controlled by such a company (as so defined) but does not include an electronic publishing joint venture owned by such an entity or corporation.

§ 275. Alarm monitoring services

(a) Delayed entry into alarm monitoring

(1) Prohibition

No Bell operating company or affiliate thereof shall engage in the provision of alarm monitoring services before the date which is 5 years after February 8, 1996.

(2) Existing activities

Paragraph (1) does not prohibit or limit the provision, directly or through an affiliate, of alarm monitoring services by a Bell operating company that was engaged in providing alarm monitoring services as of November 30, 1995, directly or through an affiliate. Such Bell operating company or affiliate may not acquire any equity interest in, or obtain financial control of, any unaffiliated alarm monitoring service entity after November 30, 1995, and until 5 years after February 8, 1996, except that this sentence shall not prohibit an exchange of customers for the customers of an unaffiliated alarm monitoring service entity.

(b) Nondiscrimination

An incumbent local exchange carrier (as defined in section 251(h) of this title) engaged in the provision of alarm monitoring services shall—

(1) provide nonaffiliated entities, upon reasonable request, with the network services it provides to its own alarm monitoring operations, on nondiscriminatory terms and conditions; and

(2) not subsidize its alarm monitoring services either directly or indirectly from telephone exchange service operations.

[47 U.S.C. § 275]

(c) Expedited consideration of complaints

The Commission shall establish procedures for the receipt and review of complaints concerning violations of subsection (b) of this section or the regulations thereunder that result in material financial harm to a provider of alarm monitoring service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, as determined by the Commission in accordance with such regulations, the Commission shall, within 60 days after receipt of the complaint, order the incumbent local exchange carrier (as defined in section 251(h) of this title) and its affiliates to cease engaging in such violation pending such final determination.

(d) Use of data

A local exchange carrier may not record or use in any fashion the occurrence or contents of calls received by providers of alarm monitoring services for the purposes of marketing such services on behalf of such local exchange carrier, or any other entity. Any regulations necessary to enforce this subsection shall be issued initially within 6 months after February 8, 1996.

(e) Definition of alarm monitoring service

The term "alarm monitoring service" means a service that uses a device located at a residence, place of business, or other fixed premises—

> **(1)** to receive signals from other devices located at or about such premises regarding a possible threat at such premises to life, safety, or property, from burglary, fire, vandalism, bodily injury, or other emergency, and

(2) to transmit a signal regarding such threat by means of transmission facilities of a local exchange carrier or one of its affiliates to a remote monitoring center to alert a person at such center of the need to inform the customer or another person or police, fire, rescue, security, or public safety personnel of such threat,

but does not include a service that uses a medical monitoring device attached to an individual for the automatic surveillance of an ongoing medical condition.

[1996 Act § 601]

The Telecommunications Act of 1996 also provides in P.L. 104-104:

Sec. 601. Applicability of Consent Decrees and Other Law

(a) Applicability of amendments to future conduct.—

(1) AT&T Consent Decrees.—Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act [this chapter as amended by the Telecommunications Act of 1996, Pub. L. 104-104, Feb. 8, 1996, 110 Stat. 56, for distribution of which see Short Title note set out under section 609 of this title] and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(2) GTE Consent Decree.—Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(3) McCaw Consent Decree.—Any conduct or activity that was, before the date of enactment of this Act [Feb. 8, 1996], subject to any restriction or obligation imposed by the McCaw Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and subsection (d) of this section and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

[1996 Act § 601]

(b) Antitrust laws.—

(1) Savings clause.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act [Telecommunications Act of 1996, Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 56, for distribution of which see Short Title note set out under section 609 of this title] shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) Repeal.—[Par. (2) repealed subsection (a) of section 221 of this title].

(3) Clayton Act.—[Par. (3) amended section 18 of Title 15, Commerce and Trade].

(c) Federal, State, and local law.—

(1) No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) State tax savings provision.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 [sections 542 and 573(c) of this title] and section 602 of this Act [set out as a note under this section].

(d) Commercial mobile service joint marketing.—Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act [sections 271(e)(1) and 272 of this title] as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecom-

[1996 Act § 601]

munications service, interLATA telecommunications service, and information services.

(e) Definitions.—As used in this section:

(1) AT&T Consent Decree.—The term "AT&T Consent Decree" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(2) GTE Consent Decree.—The term "GTE Consent Decree" means the order entered December 21, 1984, as restated January 11, 1985, in the action styled United States v. GTE Corp., Civil Action No. 83-1298, in the United States District Court for the District of Columbia, and any judgment or order with respect to such action entered on or after December 21, 1984.

(3) McCaw Consent Decree.—The term "McCaw Consent Decree" means the proposed consent decree filed on July 15, 1994, in the antitrust action styled United States v. AT&T Corp. and McCaw Cellular Communications, Inc., Civil Action No. 94-01555, in the United States District Court for the District of Columbia. Such term includes any stipulation that the parties will abide by the terms of such proposed consent decree until it is entered and any order entering such proposed consent decree.

(4) Antitrust laws.—The term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)) [section 12(a) of Title 15], except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.) [sections 13, 13a, 13b, and 21a of Title 15], commonly known as the Robinson-Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) [section 45 of Title 15] to the extent that such section 5 applies to unfair methods of competition."

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SUPREME COURT, U.S.

No. 98-652

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SBC COMMUNICATIONS INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT BELL ATLANTIC SUPPORTING PETITIONERS

JAMES R. YOUNG
JOHN THORNE
MICHAEL E. GLOVER
BELL ATLANTIC CORP.
1320 N. Courthouse Road
8th Floor
Arlington, VA 22201
(703) 974-1600

RICHARD G. TARANTO
Counsel of Record
FARR & TARANTO
1850 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 775-0184

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

RULE 29.6 STATEMENT

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition, Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, Las Cruces Cellular Telephone Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. z o. o., Nord Trans Biuro Reklam Sp. z o. o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

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SBC COMMUNICATIONS INC., *et al.*,
Petitioners,

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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT BELL ATLANTIC SUPPORTING PETITIONERS

Petitioners SBC, U S WEST, *et al.* seek review of the Fifth Circuit judgment upholding the five challenged Special Provisions Concerning Bell Operating Companies, 47 U.S.C. §§ 271-275, which impose on a closed class of 20 named persons (47 U.S.C. § 153(4)) substantial prohibitions and restrictions on their freedom to engage in a wide range of otherwise lawful commercial activity. Bell Atlantic Corporation separately has sought review of the judgment by its own petition for a writ of certiorari, docketed as No. 98-653. Bell Atlantic's petition presents all three of the distinct constitutional challenges to the Special Provisions: bill of attainder, separation of powers, and equal protection. As an appellee in the Fifth Circuit, Bell Atlantic is a respondent here, pursuant to this Court's

Rule 12.6. Bell Atlantic supports the grant of the petition filed by SBC, U S WEST, *et al.*, as well as its own petition.

The petitions for writs of certiorari should be granted.

Respectfully submitted.

JAMES R. YOUNG
JOHN THORNE
MICHAEL E. GLOVER
BELL ATLANTIC CORP.
1320 N. Courthouse Road
8th Floor
Arlington, VA 22201
(703) 974-1600

RICHARD G. TARANTO
Counsel of Record
FARR & TARANTO
1850 M Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 775-0184

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SBC COMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

BELL ATLANTIC CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION, AT&T CORP., ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, NATIONAL CABLE TELEVISION ASSOCIATION, SPRINT COMMUNICATIONS COMPANY, L. P., AND TELECOMMUNICATIONS RESELLERS ASSOCIATION

Thomas F. O'Neil III
William Single, IV
MCI WORLDCOM, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

Donald B. Verrilli, Jr.*
Ian Heath Gershengorn
Michelle B. Goodman
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

(Additional Counsel Listed on Inside Cover)

December 18, 1998

*Counsel of Record

47pp

David W. Carpenter
Peter D. Keisler
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

Mark C. Rosenblum
Marc E. Manly
Roy E. Hoffinger
AT&T CORP.
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

Counsel for AT&T Corp.

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

Counsel for Telecommunications Resellers Association

Emily Williams
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 969-2587

Counsel for Association for Local Telecommunications Services

David P. Murray, Esq.
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W., #600
Washington, D.C. 20036
(202) 328-8000

Counsel for Sprint Communications Company L.P.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664

Counsel for National Cable Television Association

Danny E. Adams
Steven A. Augustino
KELLEY DRYE &
WARREN
1200 19th Street, N.W., #500
Washington, D.C. 20036
(202) 955-9600

Counsel for Competitive Telecommunications Association

Genevieve Morelli
Exec. Vice President/
General Counsel
COMPETITIVE TELE-
COMMUNICATIONS
ASSOCIATION
1900 M Street, N.W., #800
Washington, D.C. 20036
(202) 296-6650

Counsel for Competitive Telecommunications Association

QUESTIONS PRESENTED

1. Whether §§ 271-275 of the Telecommunications Act of 1996 -- which substantially reduce the restrictions imposed on the Bell Operating Companies by a 1982 judicial consent decree -- constitute legislative punishment in violation of the Bill of Attainder Clause, U.S. Const. Art. I, § 9, because they apply to those companies by name?

2. Whether §§ 271-275 violate the constitutional requirement of separation of powers or the guarantee of equal protection merely because they apply to named companies governed by a consent decree?

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Fifth Circuit are listed at SBC Pet. ii.

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

MCI Telecommunications Corporation is a wholly owned subsidiary of MCI Communications, Inc., and MCI Communications, Inc. is a wholly owned subsidiary of MCI WORLDCOM, Inc.

MCI Telecommunications Corporation Inc. has the following nonwholly owned subsidiaries:

Integradors de Servicios S.A. de C.V.
Integradors de Servicios Central, S.A. de C.V.
News T Investments, Inc.
News Triangle Finances, Inc.
Pittsburgh Fiber
The Source2 Group, L.L.C.

AT&T Corp. has an equity or debt interest in the following publicly traded companies: AT&T Credit Holdings, Inc.; American Mobile Satellite Corporation; Lanser Wireless Inc. (Canada); and Teleport Communications Group Inc.

Sprint Communications Company L.P. ("Sprint") is a limited partnership organized for the purpose of engaging in telecommunications and related businesses, and is wholly owned by subsidiaries, which are wholly owned by Sprint Corporation, a publicly traded corporation. Sprint Communications Company L.P. has the following non-wholly

owned subsidiaries: Asian American Communications, L.L.C., Call-Net Enterprises, Inc., and United Telephone company of Kansas. The following affiliates of Sprint have issued shares and/or debt securities to the public: Carolina Telephone and Telegraph Company, Centel Corporation, Centel Capital Corporation, Central Telephone Company, Sprint-Florida, Inc., United Telephone Company of Ohio, The United Telephone Company of Pennsylvania, Sprint Capital Corporation, Sprint Spectrum L.P., and Sprint Spectrum Finance Corporation.

The Association for Local Telecommunications Services ("ALTS") is a not-for-profit trade association comprised of companies that construct and operate local telecommunications networks in competition with incumbent local exchange carriers. ALTS does not have a parent company, affiliate, or non-wholly-owned subsidiaries. ALTS has not issued shares or debt securities to the public.

Competitive Telecommunications Association ("CompTel") is the principal national industry association representing competitive telecommunications carriers and their suppliers, with over 200 members nationwide. CompTel has not issued shares or debt securities to the public. CompTel does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

The National Cable Television Association, Inc. is the principal trade association of the cable television industry in the United States, representing the interests of owners and operators of cable television systems serving over 80 percent of the nation's cable households. Its members also include cable programmers, cable equipment manufacturers and others interested in or affiliated with the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 29.6.

The Telecommunications Resellers Association ("TRA") is a national trade association representing more than 775 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA's resale carrier members resell both interexchange and local exchange services. TRA has not issued stock or debt securities to the public. TRA does not have any parent companies, subsidiaries or affiliates which have issued stock or debt securities to the public.

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STATEMENT OF THE CASE

In this case, the U.S. Court of Appeals for the Fifth Circuit correctly held that §§ 271-275 of the Communications Act, 47 U.S.C. §§ 271-275, do not violate the Bill of Attainder Clause, U.S. Const., Art. I, § 9, Cl. 3. The Clause prohibits Congress from imposing legislative punishment on specific persons or classes of persons. Sections 271-275, added by the Telecommunications Act of 1996 (the "1996 Act"), do apply to the Bell Operating Companies ("BOCs") by name. But this legislation cannot be an attainder because it does not punish the BOCs. To the contrary, the 1996 Act leaves the BOCs undeniably better off than they were before it was enacted. Unlike all other local telephone companies, the BOCs were previously subject to an antitrust consent decree that prohibited each BOC from providing long distance service anywhere in the country, and from manufacturing telecommunications equipment, until widespread competitive alternatives to the BOC's local monopolies had emerged. The 1996 Act *eliminated* the decree's restrictions on the BOCs' right to provide long distance service in most areas of the country. It also eased the substantive standards and streamlined the procedures applicable to BOC efforts to remove the remaining restrictions. That is doubtless why the BOCs lobbied hard for the very provisions they now attack, lauded Congress for enacting them, and apparently did not discern their "punitive" character until some 18 months after the Act's passage.

Even putting all that aside, review is unwarranted because the Fifth Circuit's decision does not conflict with any decision of this Court or any court of appeals. In holding that §§ 271-275 "are not punishment because they serve [the] nonpunitive purpose [of] attempting to ensure fair competition," (SBC Pet. App. 32a), the Fifth Circuit did not "subver[t]" the Attainder Clause. *See* SBC Pet. 4. The so-called "prophylactic exception" that petitioners attack is merely the "moniker" (SBC Pet. App. 19a n.20) the Fifth Circuit supplied for the

well-settled principle courts have uniformly applied for the past 150 years, namely that no law is invalidated as an attainder when "the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.'" *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984) (citation omitted).

It is petitioners who are proposing revolutionary changes in the law. They are advancing the startling claims that a line-of-business restriction on a corporation is equivalent to an occupational restriction on an individual, and that an occupational restriction on an individual is, in turn, equivalent to a disability such as a death sentence or term of imprisonment (whose "type and severity" are such that they are always punitive). But that is not, and has never been, the law. To the contrary, courts faced with Attainder Clause challenges to occupational restrictions have always conducted a searching inquiry into whether the challenged law advanced legitimate nonpunitive economic or regulatory purposes, or whether the law instead aimed to punish the persons to whom it applied. They have done so because restrictions of that nature normally are imposed by legislatures for entirely proper regulatory purposes having nothing to do with punishment. This settled law reflects the common sense notion that occupational restrictions are fundamentally different from a death sentence or incarceration, which are always punitive in character.

Thus, the Fifth Circuit did not suggest (much less hold) that even an inherently punitive sanction such as imprisonment could be saved so long as some prophylactic purpose for the sanction could be hypothesized. All the Fifth Circuit did was acknowledge that for restrictions that are *not* inherently punitive in character, the dispositive inquiry is whether the

restriction was a legitimate regulation of conduct or instead an effort to punish.

Nor does it matter that §§ 271-275 apply only to the monopoly assets controlled by the BOCs, and not to the 1,300 local exchange carriers with monopolies serving the remaining 20% of the country. If a line-of-business restriction constituted punishment (as the case would be with a legislative sentence of incarceration), it would be an attainder even if it applied to a class comprising all local carriers. In all events, however, when a list of names is simply a shorthand means of describing persons or assets that comprise a distinct class, as it is here, it is not somehow transformed into legislative punishment. Thus, SBC's attainder argument is merely a thinly-disguised equal protection challenge to the fact that the BOCs are subject to different regulations than other local carriers. That is presumably why Bell Atlantic has filed a separate petition raising such a claim directly. But because §§ 271-275 advance competitive policies of profound importance, and because there are substantial and well-recognized differences between the BOCs and all other local carriers that justify differences in treatment, these provisions raise no substantial equal protection issue.[1]

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[1]The separation of powers challenge raised in Bell Atlantic's petition is as meritless as the others, for this Court has repeatedly held that private bills, and other legislation that applies only to named parties by prospectively modifying judicial decrees, do not violate separation of powers. *See Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855).

A. Background.

1. The 20 BOCs exercise monopoly control over local telephone service in regions comprising more than 80% of America's homes and businesses. Originally, the BOCs were part of the integrated Bell System, and were affiliated with AT&T, which then monopolized the potentially competitive long distance market, and Western Electric, which monopolized the potentially competitive business of manufacturing telecommunications equipment.

The Bell System's dominance rested on the BOCs' control of local networks, which no other firm could afford to duplicate. Each local network consisted of lines and switches that connected all homes and businesses in a BOC's local service area. That network was used to provide local service, but it was also indispensable to long distance service. A long distance call initiated by a customer first traveled on the BOC's local network from the customer's premises to a point where it was handed off to AT&T's long distance facilities, which then transported the call to the recipient's local network for completion. Without access to the local network, no long distance carrier could provide service. BOC cooperation was therefore essential if companies such as MCI were to provide competitive long distance service.

2. The BOCs were divested from AT&T as a result of a 1982 antitrust consent decree (the Modification of Final Judgment or "MFJ"). The MFJ settled an eight-year-old government antitrust suit brought to address the anticompetitive effects of a single enterprise's ownership of both the "bottleneck" local exchange facilities and competitive long distance and manufacturing businesses. The MFJ's restrictions prohibited the BOCs from entering the markets for long distance telephone services, equipment manufacturing,

information services (which included electronic publishing and alarm monitoring), and any nonregulated services.[2]

In a proceeding to determine whether the proposed decree was in the public interest, both the United States and AT&T stated that the MFJ did *not* represent a determination that the BOCs had violated the antitrust laws. To the contrary, the MFJ reflected the judgment (based on substantial evidence) that the mere integration of local monopoly and long distance facilities inherently operated as an entry barrier -- whether or not an antitrust violation could ever be proven. The engineering and operation of local networks were so complex and dynamic that after-the-fact antitrust remedies for illicit favoritism toward affiliates in competitive markets could never prevent abuses of local monopolies. Moreover, allowing an integrated competitor to compete in markets dependent on access to the local network would inevitably generate huge monitoring and litigation costs. The MFJ thus did something "far more important" than determining antitrust liability; it established an industry "structure" in which separate ownership of local network monopoly facilities would allow "more certain" development of competition in the long distance and manufacturing markets by eliminating any BOC incentive to use the essential local exchange facilities in an anticompetitive manner. Competitive Impact Statement, *United States v. Western Elec. Co.*, 47 Fed. Reg. 7170, 7172 (1982). Because the MFJ's "line of business" restrictions were designed for this purpose, they were to be removed only "upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." MFJ Section VIII(C); *United States*

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[2] *United States v. American Tel. &Tel. Co.*, 552 F. Supp. 131, 227-28, 231, 232-34 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1003 (1983).

v. Western Elec. Co., 552 F. Supp. 131, 194-95, 231, (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983) (removal of the restrictions may come about only "as a result of technological developments which eliminate the . . . local exchange monopoly or from changes in the structures of the competitive markets"); *United States v. Western Elec. Co.*, 673 F. Supp. 525, 533 (D.D.C. 1987), *aff'd in part and rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990).

3. The administration of the MFJ fell to a single district judge who established a multi-stage procedure, unconstrained by deadlines, for deciding BOC requests to remove or modify the MFJ's restrictions. *See United States v. Western Elec. Co.*, Inc., 592 F. Supp. 846, 873 & nn.112-14 (D.D.C. 1984). "Almost before the ink was dry on the decree, the [BOCs] began to seek the removal of its restrictions." *United States v. Western Elec. Co.*, 673 F. Supp. at 601. The district court waived the restrictions for a number of peripheral activities where BOC control of the local network posed no threat, and eventually removed the constraints on information services and non-telecommunications businesses.[3] But it rejected all significant BOC requests to remove or narrow the core long distance and manufacturing restrictions. For example, in 1987 and again in 1991, the MFJ court rejected requests for authority to provide long distance services to customers of their cellular, paging, and other mobile radio services, all of which faced some competition. *See United States v. Western Elec. Co.*, 673 F. Supp. at 551-52 (denying waiver); *United States v. Western Elec. Co.*, 890 F. Supp. 1, 6-8 (D.D.C. 1995) (granting waiver

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[3] *See United States v. Western Elec. Co.*, 900 F.2d 283, 305-10 (D.C. Cir. 1990) (affirming removal of general restriction and portion of information services restriction); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993) (affirming removal of remaining information services restriction).

only on restrictive conditions the BOCs could not subsequently meet). The MFJ court refused to allow the BOCs to provide long-distance services to centralized gateways that provide information services, *United States v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990), or to provide long-distance signaling services. *United States v. Western Elec. Co.*, 969 F.2d 1231, 1241-43 (D.C. Cir. 1992). The MFJ court even denied a BOC request to provide long distance services originating *outside* the States where they had local bottleneck monopolies. *See United States v. Western Elec. Co.*, 673 F. Supp. at 543-45. BOC efforts to narrow the scope of the manufacturing restrictions met a similar fate. *See United States v. Western Elec. Co.*, 894 F.2d 1387 (D.C. Cir. 1990) (affirming rejection of BOC request for authority to engage in design and development of equipment); *United States v. Western Elec. Co.*, 12 F.3d 225 (D.C. Cir. 1993) (affirming rejection of BOC request for authority to finance development of equipment by independent companies in exchange for royalties).

The MFJ court also rejected the argument that the BOCs should automatically be allowed to provide long distance service in any State that had removed legal barriers to local competition. As the court explained, that argument "proceeds on the basis of the erroneous assumption that repeal of local regulation will open the local exchange monopolies to competition." *United States v. Western Elec. Co.*, 673 F. Supp. 525, 544 (D.D.C. 1987), *aff'd on this ground*, 900 F.2d 283 (D.C. Cir. 1990). The court held that because the local exchange had historically been a natural monopoly, the long-distance restriction could be removed only on a showing that for "technological or economic, as well as legal reasons, competition in local exchange markets is feasible *and has, in fact, emerged on a substantial scale*." 673 F. Supp. at 545 (emphasis added). Although the MFJ court held open the

possibility that "effective regulation" might justify removal, *id.* at 536 n.43, the court left no doubt that mere resale of BOC local services would not suffice, and that substantial, widespread facilities-based local competition was a prerequisite to removing the MFJ's core restrictions. *Id.* at 545 ("[O]nly when a practical and economically-sound method is found for large-scale bypass or for connecting local consumers by a different method -- as microwaves and satellites were ultimately found to be feasible for handling long distance traffic -- can the Regional Companies' local monopoly be regarded as eroded.").

4. Unable to secure their objectives through the judicial process, the BOCs petitioned Congress for what amounted to private legislation. As early as 1986 the BOCs urged adoption of legislation (H.R. 3800) that would have transferred to the FCC the responsibility for deciding whether the BOCs could enter markets prohibited by the MFJ.[4] In the 103d Congress, the BOCs supported legislation (H.R. 3626) -- again applying only to them -- that contained a framework for removing the long distance and manufacturing restrictions. In the 104th Congress, BOC representatives again testified in favor of a BOC-specific approach to reforming the MFJ.[5]

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[4] *See Competitive Status of the Bell Operating Companies: Hearings on H.R. 3687 and H.R. 3800, Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 586-87 (Mar. 1986) (testimony of Robert A. Dickemper, Southwestern Bell Corp.). The FCC had consistently opposed the MFJ's line of business restrictions.

[5] *E.g., Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong. 140 (May 10, 1995) (Testimony of Richard H. Brown, Vice Chairman, Ameritech).

At no time did the BOCs raise constitutional objections to legislation that would modify the MFJ's long distance and manufacturing restrictions and transfer authority for their administration to the FCC. To the contrary, Professor Tribe testified (for the BOCs) that:

> Congress has authority to lift [the MFJ] restrictions in whole or in part, replacing them with equivalent or less restrictive regulatory alternatives that *single out* the parties to the AT&T litigation, as an exercise of its authority under the Necessary and Proper Clause, Art. I, section 8, cl. 18, to "carr[y] into Execution" the powers of the Article III judiciary. Because such parties have already been *singled out* through enforcement activity of the executive branch, in litigation supervised by the judicial branch, Congress may likewise address its legislative substitute for the MFJ to those parties in particular . . . provided that it avoids imposing more burdensome restrictions, or restrictions that violate the First Amendment.[6]

5. In the 1996 Act, the BOCs finally obtained legislative relief. Congress accepted the BOCs' longstanding argument that the industry should not be governed by a consent decree administered by "a single unelected federal judge," *see* S. Rep. No. 104-230 at 5, 9 (1995), and fashioned a new legislative framework designed to open all telecommunications markets to competition. H.R. Conf. Rep. No. 104-458 at 1 (1996). Thus, in § 601, Congress provided that the BOCs would cease

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[6]Telecommunications Policy Act (Part 1): *Hearings Before the Subcomm. of Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong. 416 (Mar. 7 and Apr. 18, 1990) (emphasis added). Professor Tribe raised constitutional concerns only about legislative reimposition of restrictions that had previously been removed by the MFJ court. *See id.*

to be subject to the "restrictions and obligations" of the MFJ and would instead be subject to the "restrictions and obligations" of the Act. *See* SBC Pet. App. 142a-44a (setting forth provision). Congress also enacted §§ 251-253, which are designed to begin the process of opening local markets to competition. Those provisions do not, as the BOCs assert here, eliminate the "last vestige" of the local bottleneck. SBC Pet. 7. Section 253 simply removes state legal barriers to competitive entry, a condition the MFJ court made clear was not sufficient to justify lifting the long distance restriction. 673 F. Supp. at 544. Sections 251-252 give new entrants a legal right to use the incumbents' existing facilities to provide competing service. But until they are fully implemented (a process that is taking years), the provisions are merely words on a page. Indeed, according to the FCC, the BOCs in their regions continue to hold more than 97% of the local market. *See* Common Carrier Bureau, FCC Report on Local Competition (Dec. 5, 1998).

Consistent with the goal of increasing competition in all telecommunications markets, Congress authorized immediate BOC entry into important segments of the long-distance market previously fenced off by the MFJ. Section 271 unconditionally allowed the BOCs immediately to begin providing long distance service anywhere in the country outside their local monopoly regions. Within their regions, § 271(b)(3) enables the BOCs immediately to begin providing "incidental interLATA services" such as commercial mobile services (*e.g.*, cellular), without any of the restrictions previously imposed by the MFJ. *Compare* § 271(g)(3) *with United States v. Western Elec. Co.*, 890 F. Supp. at 7-11. Section 271 also gave the BOCs the right to provide long-distance services to connect to centralized gateways that provide information services, § 271(g)(4), and to provide long-distance signaling services, *compare* § 271(g)(5), (6).

Section 271 maintains the core of the MFJ's in-region long-distance restriction. But this provision also provides the BOCs with critical relief from the MFJ. It transfers authority over the long-distance restriction to the FCC (as the BOCs had long requested) and imposes a 90-day time deadline for deciding BOC applications. It authorizes BOC entry upon a showing that the basic requirements of §§ 251-252 have been "fully implemented" (§ 271(d)(3)(A)(i)), that some facilities-based competition exists (§ 271(c)(1)(A)), and that BOC entry is in the "public interest." § 271(d)(3)(C). The FCC has, moreover, determined that facilities-based competition exists when a new entrant leases BOC facilities pursuant to §§ 251-252;[7] Section 271 thus does not require the construction of actual competing networks. Indeed, a BOC can obtain in-region authority even when no form of competition has developed in a State, so long as the BOC has implemented the requirements of § 251(c) and the rest of § 271's competitive checklist, and satisfies § 271's other requirements. § 271(c)(1)(B). Section 271 also specifies that BOCs may obtain such authority on a state-by-state basis. The test for BOC entry is thus substantially less demanding under § 271 than it was under the MFJ.

Sections 272-275 set forth other MFJ-related provisions. Section 272 requires the BOCs to provide long distance services through separate affiliates once they obtain in-region authority pursuant to § 271. Section 273 continues the MFJ's manufacturing restriction until a BOC satisfies the test for in-region long distance authority, but § 273(b) narrows that restriction by allowing the BOCs immediately to engage in "close collaboration" with manufacturers regarding design and

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[7] *In re Application of Ameritech Michigan*, Memorandum Opinion and Order, 9 Communication Reg. (P&F) 267, ¶ 101 (1997).

development of equipment, to engage in "research activities related to manufacturing," and to enter into "royalty agreements" with manufacturers. Section 274 requires the BOCs to participate in the electronic publishing market (a subset of the information services market barred to them until the MFJ court removed the restriction) only through a separate affiliate until the provision sunsets in February 2000. It does not, however, "prohibit a separate affiliate . . . from engaging in the provision of electronic publishing." § 274(a). Section 275 restricts BOC entry into the alarm monitoring market (another subset of the information services market) until the provision sunsets in February 2001, but grandfathers in the only BOC that had entered that market.

Further, §§ 274 and 275 affect only the BOCs' ability to provide certain information services. Section 271(b)(4), however, grants the BOCs immediate relief that they said was essential for them to be able to enter the information services market by allowing them to provide long distance services to access centralized databases. *See Memorandum of the Bell Companies in Support of Their Motion for a Waiver of the Interexchange Restriction to Permit Them to Provide Information Services Across LATA Boundaries, United States v. Western Elec. Co.*, No. 82-0192 (D.D.C.) (filed June 25, 1993). Sections 274-275 impose restrictions on segments of the information services market where the loosening of that prohibition was thought to have special significance.

6. The BOCs enthusiastically supported enactment of this legislation. The Act's principal sponsor, Senator Pressler, noted that "[w]e now have the regional Bell Companies supporting the bill and we have the long distance companies supporting the bill. . . . That is an unusual, rare moment in American history." 142 Cong. Rec. S393 (daily ed. Jan. 26, 1996). After the Act's passage, SBC's Chairman lauded § 271

as "landmark legislation" that would allow SBC to "immediately provide long-distance service outside our . . . region and to our cellular customers everywhere,"[8] and that created "clear and reasonable pathways" for SBC to obtain authority to provide long distance service within its region -- "pathways that we're happy with."[9] The other BOCs were equally lavish in their praise.

7. Immediately after the 1996 Act became law, the BOCs took advantage of § 601(a) to move for formal termination of the MFJ in the district court. The district court vacated the MFJ in a brief order entered in April 1996. *United States v. Western Elec. Co.*, No. 82-0192 (HHG), 1996 WL 255904 (D.D.C. Apr. 11, 1996). The BOCs did not question the constitutionality of §§ 271-275 in that proceeding. Had any BOC done so, the MFJ court could not have terminated the MFJ without first determining whether §§ 271-275 are constitutional, and if not, whether they are severable from § 601(a) or the rest of the 1996 Act. A few months after the MFJ was vacated, SBC and other BOCs began applying pursuant to § 271 for authority to

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[8]SBC Communications Inc., Investor Information, Statement of Edward Whitacre, Jr., Feb. 20, 1996; Chairman Edward Whitacre, Jr., Investor Briefing, Mar. 23, 1996.

[9]The Chairman of PacTel (now part of SBC) "lauded the signing of landmark telecommunications reform legislation . . . saying it, 'will unleash an extraordinary array of new services,'" and "congratulate[d] the Members of Congress and their staffs who made this bill happen." PacTel News Release, Feb. 8, 1996, at 1. NYNEX's chairman "applaud[ed] Congress for making history," and NYNEX's press release noted that the "bill sets the stage for real competition to develop in the local and long distance [markets] . . . by removing legal and regulatory barriers to [competition]." NYNEX News Release, Feb. 1, 1996. BellSouth's Chairman hailed the Act as inaugurating "a new era of competition in communications services," and noted the "bipartisan and industry-wide support for the [Act]." PR Newswire, Feb. 8, 1996.

provide in-region long distance service -- again raising no Attainder Clause challenge. The FCC denied the initial applications. It was not until 18 months after the Act's passage that SBC first attacked the long distance restriction as an attainder.

B. Proceedings Below.

1. SBC filed the instant action on July 2, 1997 in the District Court for the Northern District of Texas (Kendall, J.). On December 31, 1997, the court issued an opinion invalidating §§ 271-275. Acknowledging that §§ 271-275 would have been constitutional had they applied to all local exchange carriers, the court nevertheless concluded that the fact that they applied to a named subset of carriers automatically transformed them from valid economic regulations into punishment forbidden by the Attainder Clause. SBC Pet. App. 66a, 70a.

2. The Fifth Circuit reversed, holding that the provisions do not constitute "punishment" and thus cannot be bills of attainder. SBC Pet. App.12a-14a. The court reached this result on the basis of the "three necessary inquiries" prescribed by this Court: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" SBC Pet. App. 30a (quoting *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984)).

Examining the "type and severity of [the] burdens imposed," SBC Pet. App. 30a, the court held that §§ 271-275 "are not punishment because they serve a nonpunitive purpose:

attempting to ensure fair competition in the markets for local service, long distance, telecommunications equipment, and information services." SBC Pet. App. 32a. Recognizing that the challenged provisions "represent a hard-fought compromise on a massive issue of public policy which, in the end, contained both good and bad elements for the BOCs," the court concluded that "a legislative quid pro quo on this level simply cannot be punitive for attainder purposes." SBC Pet. App. 33a, 35a.

Judge Smith dissented. The gravamen of his dissent was that §§ 271-275 were analogous to barring specified individuals from pursuing a profession, and should for that reason automatically be deemed punishment.

REASONS TO DENY THE PETITIONS

The Petitions for Certiorari should be denied. There is no conflict among the Circuits respecting the constitutionality of §§ 271-275. The Fifth Circuit's decision is a correct application of settled Attainder Clause principles. The D.C. Circuit is in agreement with the Court of Appeals in this case that § 274 of the 1996 Act is not a bill of attainder. *See BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998). In the unlikely event the D.C. Circuit departs from its prior analysis and holds § 271 unconstitutional in the case presently under submission, *BellSouth Corp. v. FCC*, No. 98-1019, this Court can grant review at that time. Unless such a conflict develops, review is not warranted.

The BOCs' principal plea for review depends on characterizations of §§ 271-275 that are baseless, and would require revolutionary change in settled law interpreting the Attainder Clause. To begin with, this case does not present the question whether the Attainder Clause forbids Congress from

"singl[ing] out 20 companies alone and by name for disabilities of a type this Court has repeatedly concluded constitutes punishment." *See* SBC Pet. (i). Congress did not single out the BOCs; the MFJ did. Congress thus legislated respecting a class the MFJ had already defined. Moreover, it strains credulity to describe §§ 271-275 as imposing "disabilities" that constitute "punishment." The challenged provisions made the BOCs undeniably better off by freeing them immediately from many of the MFJ's line of business restrictions, and by providing what they themselves call "clear and reasonable pathways" for removing the remainder -- pathways that are both substantively and procedurally more favorable to the BOCs than was the MFJ. In all events, even if §§ 271-275 were deemed "disabilities," they are not punishment. To the contrary, they are a legitimate and familiar form of economic regulation. The Fifth Circuit simply followed settled law in concluding that the provisions are not punitive in nature.[10]

I. THIS CASE DOES NOT PRESENT THE QUESTION IDENTIFIED IN SBC'S PETITION.

SBC's petition should be denied because this case does not even remotely present the question whether Congress may single out named corporations for punishment that takes the form of barring them from lines of business previously open to them.

1. Congress did not single out the BOCs for disfavored legislative treatment, much less render a legislative verdict that the BOCs and their management "hav[e] uncontrollable monopolistic tendencies." SBC Pet. 22. As Professor Tribe

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[10]The alternative questions presented by Petitioner Bell Atlantic are meritless as well. *See* Point III *infra*.

testified to Congress in 1990, Congress could legislate specifically respecting the BOCs because they "have already been singled out" and made a distinct class by the MFJ. *See* page 9 *supra*. The MFJ had effectively established a national telecommunications policy framework because it applied to companies that controlled local service in 80% of the country and almost all major business centers. Any comprehensive overhaul of telecommunications regulation would naturally address the existence of those nationwide regulatory requirements, especially if Congress sought an approach that had the support of an industry consensus. Congress may single out by name a "legitimate class" for separate regulatory treatment, *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977), and that is all Congress did here.

2. For similar reasons, there is no basis to contend that §§ 271-275 reflect a congressional judgment that the BOCs are guilty of antitrust violations or are unusually likely to commit such violations in the future. The MFJ was a consent decree in a civil proceeding. It was premised not on a determination of the BOCs' guilt, but on a judgment that the mere integration of long distance facilities and concentrated local facilities inherently operates as a barrier to competition. Section 271 is no different. In all events, §§ 271-275 do not apply only to the BOCs, but to *any* firm that owns the monopoly local exchange facilities that the BOCs currently own. Section 271(a) (applicable to any "Bell operating company" or affiliate); *id.* § 153(4)(B) (defining "Bell operating company" as including "*any successor or assign of [a BOC] that provides wireline telephone exchange service*.") (emphasis added). Accordingly, if SBC were to sell its local exchange facilities to another firm, that entity would become subject to the restrictions in §§ 271-275. Because these restrictions apply to *any* owner of the particular facilities formerly governed by the MFJ, the BOCs'

contention that Congress singled them out for who they are or what they have done is wrong. Indeed, that contention is impossible to square with Congress' decision to free the BOCs to enter the large majority of the long distance market immediately.

3. The BOCs' argument that §§ 271-275 single them out for "disabilities" -- indeed, "historically forbidden punishments" SBC Pet. (i), 20 -- is pure distortion. The challenged provisions confer enormous benefits on the BOCs, which they lobbied for and praised at every juncture. Along with § 601(a)(1) of the 1996 Act (with which they are inseverably bound), the challenged provisions grant the BOCs long-sought relief. As a direct result of the Act, each BOC was immediately freed to compete for the vast majority of what the BOCs describe as the $70 billion long distance market. SBC Pet. 3. Moreover, if a BOC purchases local exchange facilities outside its region that are not covered by § 271, the BOC is free to use those facilities to provide long distance services in that region. *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization from Southern New England Telecommunications Corp., Transferor to SBC Communications, Inc., Transferee*, CC Docket No. 98-25, FCC 98-276, ¶ 36 (rel. Oct. 23, 1998). Section 271 likewise ameliorated the remaining MFJ long-distance and manufacturing restrictions by reducing the showing of local competition necessary to justify entry, and transferring administration of the restrictions to the FCC, which must operate under tight time deadlines.

4. For the above reasons, the Fifth Circuit's decision does not even remotely stand for the proposition that Congress may single out an individual company such as "Bank of America, Citibank, and NationsBank alone and by name" for restrictions on participating in investment banking. SBC Pet. 20. Even if

such a law would raise Bill of Attainder issues, no such law is at issue here. If Congress enacts such a law in the future (and there is no reason to think it will), the question posed by the BOCs can be considered then. It is neither necessary nor appropriate to do so now.

II. THE FIFTH CIRCUIT CORRECTLY APPLIED SETTLED ATTAINDER CLAUSE LAW IN HOLDING THAT SECTIONS 271-275 IMPOSED NO "PUNISHMENT" ON PETITIONERS.

Review would be unwarranted even if §§ 271-275 could properly be viewed as "disabilities" imposed for the first time on the BOCs. A line of business restriction is a familiar form of economic regulation that legislatures routinely impose for reasons having nothing to do with punishment. As Judge Williams observed, such laws are a "rather conventional response to commonly perceived risks of anticompetitive behavior." *BellSouth v. FCC*, 144 F.3d at 65. *See, e.g., Board of Governors of Fed. Reserve Sys. v. Agnew*, 329 U.S. 441 (1947) (discussing § 32 of the Banking Act of 1933 which prohibits members of firms that underwrite securities from serving as officers of National Banks); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership ban). Such laws are obviously not punishment when applied to all participants in a market or profession. No court (other than the district court below) has ever held that such restrictions are transformed into punishment when applied to a specifically-defined group. Indeed, no court has ever held that superficially similar (but in fact quite different) legislation restricting individuals from pursuing professions or callings is automatically forbidden punishment when applied to named persons or a closed class. Courts have uniformly held that such restrictions may or may not be attainders, depending on whether they serve nonpunitive

regulatory purposes. The Fifth Circuit was thus on solid ground in conducting the "necessary" inquiry into whether §§ 271-275 serve such nonpunitive purposes. SBC Pet. App. 30a. Petitioners' claims that the Court of Appeals acted "[i]n the teeth of . . . precedent[]," "radically reinterpreted Attainder Clause jurisprudence," and "created" a new "exception" to the Clause (SBC Pet. 3, 4, 15), are specious.

1. It is well established that "laws that impose a duty or liability upon a single individual or firm are not on that account invalid," because "the Bill of Attainder Clause . . . requires not merely 'singling out' but also punishment." *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 239 n.9 (1995). It is also well established that not every legislatively imposed disability constitutes "punishment." *Nixon*, 433 U.S. at 478 n.40 ("[O]ne who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct"). Some disabilities -- such as execution, imprisonment, or banishment -- are inherently punitive in light of their "type and severity," and qualify as "punishment" for Attainder Clause purposes irrespective of whether they also serve prophylactic public purposes such as incapacitation or deterrence. Outside that narrow category, however, the Court has made clear "the need to examine the purposes served by a purported bill of attainder in determining whether it in fact represents a punitive law." *Id.* That is why the second of the three inquiries the Court described as "necessary" in *Selective Service System v. Minnesota Public Interest Research Group* requires evaluation of "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." 468 U.S. 841, 852 (1984) (internal quotations omitted).

2. To try to create confusion where none exists, the BOCs contend that restrictions on the pursuit of a profession (and by analogy corporate line-of-business restrictions) fall within the narrow category of inherently punitive disabilities. They would treat such restrictions, in other words, as the corporate equivalent of a legislative death penalty imposed on an individual. For this proposition, they rely principally on *Nixon* -- a case rejecting an Attainder Clause challenge. To be sure, *Nixon* indicated that "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations" might qualify as punishment (especially where "employed against those legislatively branded as disloyal"), 433 U.S. at 474, but *Nixon* did not suggest (much less hold) that such restrictions are automatically classified as punitive. To the contrary, the Court made clear that a "functional" analysis was necessary, and supported that assertion by citing the very case the BOCs here assert established an automatic rule of invalidation for restrictions on employment. *Id.* at 475-76 (citing *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 319-20 (1866)).

Cummings itself made clear that restrictions on individuals' pursuit of a profession "may" or may not be punitive, depending on "the circumstances attending and *the causes of* the deprivation." 71 U.S. (4 Wall.) at 320 (emphasis added). The Court's holding that the restrictions at issue were punitive resulted from a careful analysis of whether they were "appropriate as a condition of allowing the exercise of the profession," and concluding that there was "no connection" between the restriction imposed and any nonpunitive regulatory purpose. *Id. See also Hawker v. New York*, 170 U.S. 189, 198 (1898) (noting the *Cummings* Court's conclusion that "these oaths had no relation to the fitness or qualification of the two parties"); *Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (same). Thus, far from establishing a rule of automatic

invalidation, the authority invoked by the BOCs unambiguously establishes that a restriction on the pursuit of a profession may or may not be punitive, depending on whether it can be justified on the basis of nonpunitive regulatory purposes.

This Court's precedents have always reflected that distinction. In *De Veau v. Braisted*, 363 U.S. 144 (1960), for example, the Court held that a restriction on the ability of convicted felons to hold office in any waterfront labor organization did not constitute punishment for Attainder Clause purposes. As *DeVeau* explained, the dispositive inquiry is "whether the legislative aim was to punish th[e] individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." 363 U.S. at 160. *Accord Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (restriction not punishment where "the source of [the] legislative concern can be thought to be the activity . . . from which the individual is barred, . . . even though it may bear harshly upon the one affected"). In contrast, the only employment bans held by this Court to be punitive for purposes of the Bill of Attainder clause have been bans imposed on suspected subversives or traitors. *See United States v. Brown*, 381 U.S. 437 (1965) (communists); *United States v. Lovett*, 328 U.S. 303 (1946) (same); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872) (same); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (members of the Confederacy); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (same). In such situations, the decision to apply the restrictions to suspected traitors, and no others, severely undermined any effort to defend the restrictions on the ground that they aimed to regulate the calling rather than punish the person.

3. In the infrequent instances when Attainder Clause issues have arisen, the courts of appeals have applied these

settled principles in a straightforward manner that does not remotely suggest a need for guidance from this Court. *See, e.g.*, *BellSouth Corp. v. FCC*, 144 F.3d 58, 65 (D.C. Cir. 1998); *McMullen v. United States*, 989 F.2d 603, 612 (2d Cir. 1993); *Brookpark Entertainment Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991); *Dehainaut v. Pena*, 32 F.3d 1066, 1071 (7th Cir. 1994); *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1202 (8th Cir. 1997); *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 727 (9th Cir. 1992). The D.C. Circuit, quoting Professor Tribe's treatise, expressly held that "'[e]ven measures historically associated with punishment -- such as permanent exclusion from an occupation -- have been otherwise regarded when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing.'" 144 F.3d at 65 (quoting Laurence H. Tribe, American Constitutional Law § 10-5, at 655 (2d ed. 1988)). Similarly, the Seventh Circuit has previously held that "[e]ven where a fixed identifiable group . . . is singled out and a burden traditionally associated with punishment -- such as permanent exclusion from an occupation -- is imposed, the enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and non-punitive ends and was not clearly the product of punitive intent." *Dehainaut v. Pena*, 32 F.3d at 1071. Thus, it is hardly surprising that both the Fifth Circuit in the case at bar and the D.C. Circuit in *BellSouth v. FCC* analyzed the constitutionality of § 274 in precisely the same manner, and reached the same result.

4. In sum, there can be no doubt that the Fifth Circuit was required to conduct a meaningful inquiry into whether §§ 271-275 truly constitute punishment of the BOCs. Petitioners deride the Fifth Circuit's analysis as creating an "imaginary 'prophylactic exception.'" But the Fifth Circuit's application of what it called the prophylactic exception was no more and no less than what *Selective Service* said was a "necessary" inquiry

into whether the provisions, "viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes." 468 U.S. at 852 (internal quotations omitted). As the court noted, the phrase "prophylactic exception" was nothing more than a "moniker" for the test courts have always applied. SBC Pet. App. 19a n.20. The Fifth Circuit did not, however, hold (or even suggest) that self-evidently punitive disabilities such as execution, imprisonment or banishment could be saved from invalidation under the Bill of Attainder Clause merely by positing a prophylactic purpose for the punishment. To the contrary, the court conducted the inquiry to determine whether the provisions should be considered punishment to begin with, and concluded that they "*are not punishment* because they serve a nonpunitive purpose." SBC Pet. App. 32a (emphasis added). Thus, Petitioners' plea for review boils down to a disagreement with the label the Fifth Circuit chose for a well-settled principle of law.

5. It is Petitioners themselves who seek a radical reinterpretation of the Attainder Clause. The BOCs assert that the Clause "ensures that, where Congress seeks to impose a *disability*, it acts only by 'set[ting] forth a generally applicable rule' governing the conduct of all parties that possess particular traits, not by simply specifying individual parties that it believes should be subject to the *disability*." SBC Pet. 13-14 (emphasis added) (quoting *Brown*, 381 U.S. at 450). That, however, is emphatically not the law. *See Plaut v. Spendthrift Farms, Inc.*, 514 U.S. at 239 n.9. ("[L]aws that impose a duty or liability upon a single individual or firm are not on that account invalid -- or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also punishment.").

Nor are the BOCs correct that there should be a more stringent rule under the Bill of Attainder Clause for statutes that single out entities by name, rather than by defining a closed class encompassing identifiable entities. Those are, as the principal case on which the BOCs rely notes, "distinctions without a difference." *Brown*, 381 U.S. at 461. It is entirely permissible for Congress to legislate respecting specific named entities if the list of names is merely a shorthand for defining a class upon which Congress may legitimately impose a distinct regulatory regime. *See* Laurence H. Tribe, American Constitutional Law, § 10-4, at 646 (2d ed. 1988); *Brown*, 381 U.S. at 454 & n.29. Indeed, *Nixon* held that Congress may identify by name a "legitimate class of one." 433 U.S. at 372. So long as a reasonable nonpunitive explanation exists for treating the named entities differently from others, it does not matter whether the entities have been identified by name or on the basis of a characteristic applicable to a closed class. Just as the disabilities at issue in *Nixon* were not deemed automatically invalid merely because they applied to the former President by name, the disabilities at issue in *Brown* were not subject to more lenient review merely because they applied to a class defined by a common characteristic, rather than to specifically identified Communists.

III. THE FIFTH CIRCUIT'S DECISION DOES NOT PRESENT ANY SEPARATION OF POWERS OR EQUAL PROTECTION QUESTION WARRANTING REVIEW.

1. Bell Atlantic has not raised any separation of powers issue warranting review. Bell Atlantic admits, as it must, that if §§ 271-275 were applicable to all local exchange carriers, those provisions would raise no separation of powers concerns. BA Pet. 10. The claimed constitutional offense, therefore, is not that §§ 271-275 altered the law in a way that would modify

the prospective effect of the MFJ, but that they are "*party- and case-* specific." BA Pet. 18 (emphasis added). *Wheeling Bridge*, however, makes clear that Congress may change the law underlying ongoing equitable relief even if, as in that case itself, the statute specifically names the parties to and the subject of a particular injunction. 59 U.S. at 429; *see also Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). *Wheeling Bridge* was not, as Bell Atlantic asserts, person-neutral. It involved a congressional enactment that identified by name "bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island," and provided that "said bridges be declared to be and are established post-roads for the passage of the mails of the United States, and that *the Wheeling and Belmont Bridge Company* are authorized to have and maintain their bridges at their present site and elevation." 59 U.S. at 429 (internal quotes omitted) (emphasis added).

Nor can Bell Atlantic rescue its separation of powers argument by contending that *Wheeling Bridge* is no longer good law after *Plaut*. BA Pet. 23. That case explicitly stated that "nothing in our holding today calls [*Wheeling Bridge*] into question." *Id.* *Plaut* held only that Congress may not reopen final judgments, and noted that cases upholding legislation "that altered the prospective effect of injunctions entered by Article III courts . . . . distinguish themselves." 514 U.S. at 232. The distinction between legislation directing the reopening of final judgments (held unconstitutional in *Plaut*) and legislation altering the prospective effect of ongoing equitable relief (upheld in *Wheeling Bridge*) has been well understood by the Courts of Appeals.[11]

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[11] *See Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997) (per curiam) ("As the Court explained in *Plaut v. Spendthrift Farm, Inc.*, a true 'final judgment' here means not an appealable judgment, but one that

2. Nor has Bell Atlantic raised any equal protection issue worthy of review. Sections 271-275 are economic regulations to which the rational basis test applies. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Congress' decision to treat the BOCs differently from other local carriers is plainly rational. Although GTE and the nation's remaining local telephone companies are also monopolies, they have operations that are geographically dispersed, serve overwhelmingly rural and suburban areas, or are far smaller. For these reasons, federal courts and the United States Department of Justice have long concluded that the BOCs should be treated differently from all other local carriers, based on the common sense perception that the BOCs' massive, concentrated monopoly facilities gave them an ability to discriminate and cross-subsidize not shared by other local carriers -- including GTE.[12]

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represents the 'last word of the judicial department with regard to a particular case or controversy.' Consent decrees are final judgments, but not the 'last word of the judicial department.'"), *cert. denied*, 118 S. Ct. 2375 (1998) (footnotes omitted); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997) (same), *cert. denied*, 118 S. Ct. 2366 (1998); *Benjamin v. Jacobson*, 124 F.3d 162, 171 (2d Cir. 1997) (same); *Gavin v. Branstad*, 122 F.3d 1081, 1087 (8th Cir. 1997) (same); *Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 2460 (1997).

[12] *See, e.g., Competitive Status of the Bell Operating Companies: Hearing on H.R. 3687 and H.R. 3800, Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 86 (Mar. 13, 1986) (testimony of Douglas H. Ginsburg, Assistant Attorney General) ("The GTE telephone subscribers are not only many fewer in number than any of the RBOC's, but they are scattered geographically around the country."); *Telecommunications: The Role of the Department of Justice: Hearing Before the House Committee on the Judiciary*, 104th Cong. 66 (May 9, 1995) (testimony of Anne K. Bingaman, Assistant Attorney General) (relying on same distinction to explain "why the BOCs were subject to the line-of-business restrictions while GTE was allowed to offer long distance

In the face of this settled law, Bell Atlantic asks this Court to mint a new requirement of heightened scrutiny for economic regulations that allegedly fail a test of "person neutrality." But there is nothing presumptively suspect about person-specific laws. As this Court said in *Plaut*, "[w]hile legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action." *Plaut*, 514 U.S. at 239 n.9. That statement in *Plaut* follows inevitably from the Court's opinion in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), which applied rational basis scrutiny to an ordinance banning all but two specific pushcart vendors from New Orleans' French Quarter. Since *Dukes*, the Courts of Appeals have uniformly rejected a requirement of "person-neutrality" in cases involving person-specific statutes. *See, e.g., Maine Central Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484, 488 (1st Cir. 1987); *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 (9th Cir. 1993); *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339 (7th Cir. 1992); *Apache Bend Apartments Ltd. v. United States*, 964 F.2d 1556, 1564 (5th Cir. 1992), *superseded on standing grounds*, 987 F.2d 1174 (1993). This settled principle applies to laws that "disadvantage[] an individual or identifiable members of a group," as well as those that benefit a specific person. *Nixon*, 433 U.S. at 471 n.33. *Accord Maine Central Railroad Co.*,

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services through a separate subsidiary"). *See also United States v. GTE Corp.*, 603 F. Supp. 730, 753 (D.D.C. 1984) (concluding that GTE "lacks the vast market domination . . . that would enable it to engage in anticompetitive practices irrespective of injunctions and separate affiliate provisions." *United States v. Western Elec. Co.*, 673 F. Supp. 525, 549 (D.D.C. 1987) (expressly rejecting the argument that the BOCs were indistinguishable from GTE and that the MFJ's line of business restrictions thus should be removed), *aff'd in part and rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990).

813 F.2d at 488; *Atonio v. Wards Cove Packing Co.*, 10 F.3d at 1495. It need not be revisited.

IV. PRACTICAL EXIGENCIES DO NOT WARRANT A GRANT OF CERTIORARI IN THIS CASE.

The practical arguments raised by the BOCs likewise provide no basis for granting review, and instead underscore the singular impropriety of invalidating §§ 271-275 on the basis of the constitutional arguments the BOCs have raised.[13] At the heart of the SBC Petition is a frank plea that this Court take national telecommunications policy into its own hands. The BOCs demand prompt review so that they might enter the long distance market in regions where they are still monopolies, asserting that such an outcome would produce "consumer gains." SBC Pet. 30; *see also id.* at 5.

Having waited 18 months after enactment of §§ 271-275 to challenge those provisions, the BOCs are hardly in a position to press this Court for immediate action. Moreover, in the unlikely event that this Court were to grant review and reverse the decision of the Fifth Circuit, the BOCs would *still* not obtain the relief they have sought in this litigation -- namely, the right to provide in-region long distance service. Such a result would depend on a further ruling that these provisions are severable from the remainder of the 1996 Act and in particular from § 601(a), which provided for termination of the MFJ. But §§ 271-275 are not severable. *See BellSouth*

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[13]The *amicus* brief filed by the Attorneys General of eleven States provides no additional reason for granting review. That brief argues that if this Court is going to invalidate §§ 271-275, it should do so sooner rather than later to save the States the cost of various administrative proceedings. But that would be a reason to grant review only if the Fifth Circuit erred in upholding §§ 271-275 -- and it did not.

v. FCC, 144 F.3d at 66 n.8 ("Severability is largely a matter of legislative intent, and it is doubtful that Congress would have intended the many provisions of the Act beneficial to the BOCs to survive deletion of this burdensome one.") Indeed, the BOCs' own arguments preclude a finding of severability. If the BOCs are correct that Congress imposed §§ 271-275 because it wanted to punish the BOCs based on their supposed proclivities to violate the antitrust laws, then Congress could not possibly have intended to relieve the BOCs of the purportedly less stringent provisions of the MFJ in the event §§ 271-275 were invalidated. Thus, a ruling in the BOCs' favor on the question presented would do no more than restore the jurisdiction of a single district judge applying the standards and procedures of the MFJ.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

Thomas F. O'Neil III
William Single, IV
MCI WORLDCOM, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6096

Counsel for MCI WORLDCOM, Inc.

Donald B. Verrilli, Jr.*
Ian Heath Gershengorn
Michelle B. Goodman
JENNER & BLOCK
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

**Counsel of Record*

David W. Carpenter
Peter D. Keisler
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7237

Counsel for AT&T Corp.

Mark C. Rosenblum
Marc E. Manly
Roy E. Hoffinger
AT&T CORP.
295 N. Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

Counsel for AT&T Corp.

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP, P.C.
1620 I Street, N.W., Suite 701
Washington, D.C. 20006
(202) 293-2500

Counsel for Telecommunications Resellers Association

Emily Williams
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 969-2587

Counsel for Association for Local Telecommunications Services

David P. Murray, Esq.
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W., #600
Washington, D.C. 20036
(202) 328-8000

Counsel for Sprint Communications Company L.P.

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664

Counsel for National Cable Television Association

Danny E. Adams
Steven A. Augustino
KELLEY DRYE &
WARREN
1200 19th Street, N.W., #500
Washington, D.C. 20036
(202) 955-9600

Counsel for Competitive Telecommunications Association

Genevieve Morelli
Exec. Vice President/
General Counsel
COMPETITIVE TELE-
COMMUNICATIONS
ASSOCIATION
1900 M Street, N.W., #800
Washington, D.C. 20036
(202) 296-6650

Counsel for Competitive Telecommunications Association

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Nos. 98-652 and 98-653

In the Supreme Court of the United States

OCTOBER TERM, 1998

SBC COMMUNICATIONS INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

BELL ATLANTIC CORP., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JOEL I. KLEIN
Assistant Attorney General

PHILIP D. BARTZ
Acting Assistant Attorney General

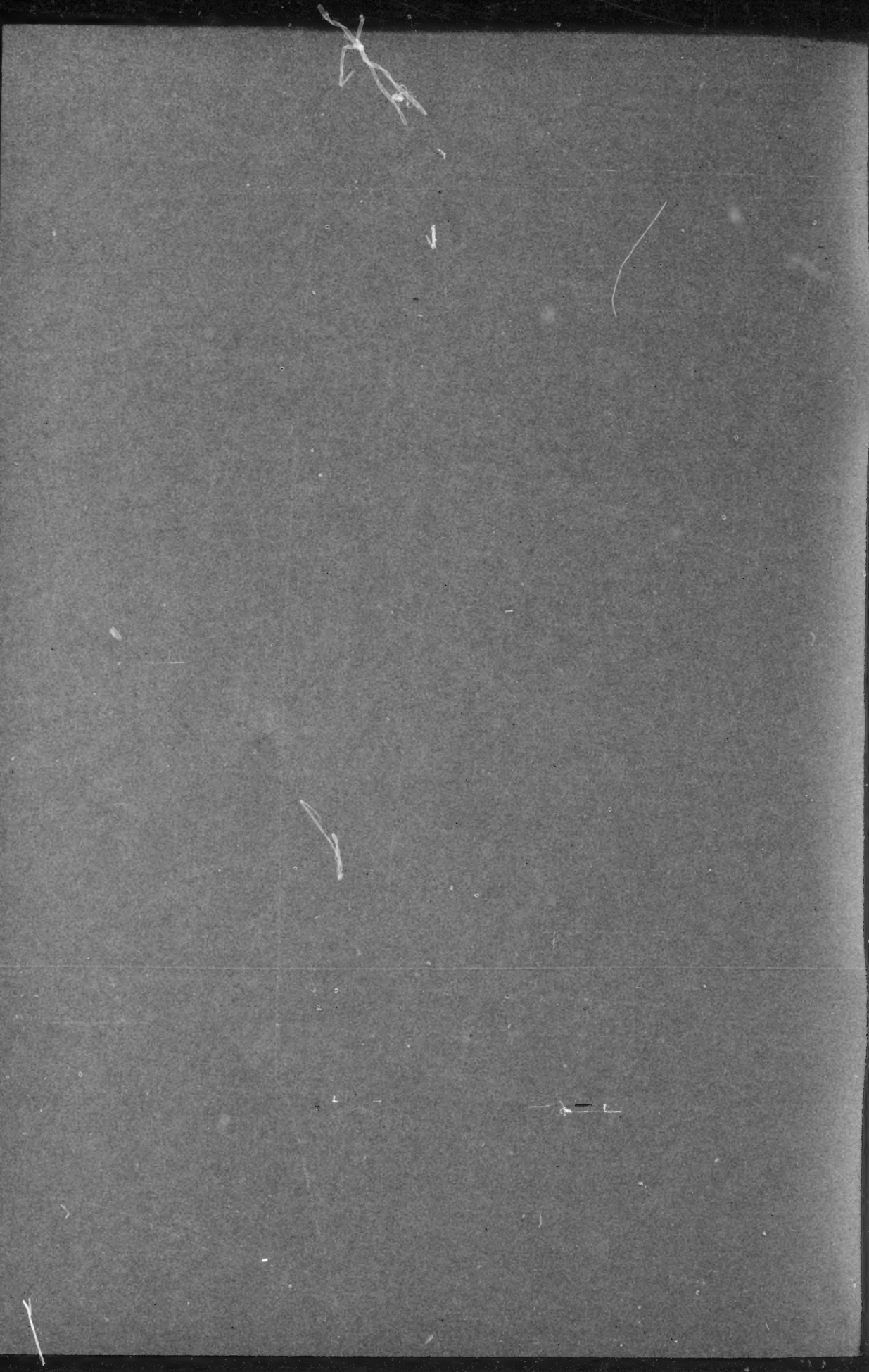
MARK B. STERN
JACOB M. LEWIS
ALISA B. KLEIN
DANIEL L. KAPLAN
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CHRISTOPHER J. WRIGHT
General Counsel

JOHN E. INGLE
Deputy Assistant General Counsel

Federal Communications Commission
Washington, D.C. 20554



QUESTION PRESENTED

Whether certain provisions of the Telecommunications Act of 1996 applicable to the activities of the Bell Operating Companies (47 U.S.C. 271-275) constitute "bills of attainder," violate separation of powers principles, or deny those companies the equal protection of the laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a[1]) is reported at 154 F.3d 226. The opinion of the district court (Pet. App. 54a-73a) is reported at 981 F. Supp. 996.

[1] "SBC Pet." refers to the petition for a writ of certiorari in No. 98-652; "Bell Atl. Pet." refers to the petition in No. 98-653. "Pet. App." refers to the appendix to the petition in No. 98-652. (The appendices to the petitions are identical.)

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1998. The petition for a writ of certiorari in No. 98-652 was filed on October 19, 1998, and the petition for a writ of certiorari in No. 98-653 was filed on October 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree—which became known as the Modification of Final Judgment, or MFJ—that required it to divest its local exchange operations. The newly independent Bell Operating Companies (BOCs) continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service. The BOCs were initially grouped into seven corporate entities known as "Regional Bell Operating Companies." See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). After recent mergers, that number now stands at five: Bell Atlantic, BellSouth, SBC Communications, Ameritech, and U S WEST.

The consent decree, overseen for many years by the federal district court in Washington, D.C., prohibited

the BOCs from providing long-distance telephone service, manufacturing telecommunications equipment, and providing information services. In approving the restriction on long-distance service,[2] the district court explained that a BOC, if permitted to enter the long-distance market, could use its monopoly control over local bottleneck facilities (through which all calls must pass) to impede long-distance competition in two principal ways: The BOC could subject competitors to discriminatory terms of access to the local network, and it could cross-subsidize its own long-distance operations with its monopoly local revenues. *AT&T Co.*, 552 F. Supp. at 187-188, 223. The court cited related concerns in approving the restrictions on information services and equipment manufacturing. See *id.* at 189-191.

2. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, comprehensively overhauled the regulation of all telephone markets. In the "local competition" provisions of the Act, 47 U.S.C. 251 *et seq.*, Congress sought to open local markets to full competition for the first time by requiring all incumbent local exchange carriers (LECs), including

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[2] The district court divided the Bell Companies' collective geographical regions into approximately 160 exchange areas, known as "local access and transport areas" or "LATAs." See *United States* v. *Western Elec. Co.*, 569 F. Supp. 990 (D.D.C. 1983). The relevant restriction in the consent decree permitted the BOCs to provide telephone service "only between points within a single LATA, providing what is, basically, the traditional local telephone service." *United States* v. *Western Elec. Co.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied, 507 U.S. 951 (1993). For ease of exposition, we refer to inter-LATA calls in the vernacular: as "long-distance calls." Such calls should not be confused with the somewhat larger category of "toll calls," which includes some *intra*-LATA calls that the decree permitted the Bell Companies to carry.

the BOCs, to make their networks and services available to new entrants in three distinct but complementary ways. See 47 U.S.C. 251(c)(2)-(4). First, Section 251(c)(2) requires the incumbents to "interconnect" their networks with those of other carriers, and to do so "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Second, Section 251(c)(3) entitles potential competitors to lease elements of an incumbent's network, again at "just, reasonable, and nondiscriminatory" rates, terms, and conditions. Finally, Section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users. Several important issues concerning those local competition provisions are now pending before this Court in *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (argued Oct. 13, 1998), and consolidated cases.

Congress also enacted a set of provisions—applicable to the BOCs and "any successor or assign" (47 U.S.C. 153(4)(B) (Supp. II 1996))—that "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing * * * a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 66 (D.C. Cir. 1998) (emphasis in original). The most basic of those provisions is Section 601(a) of the 1996 Act, 110 Stat. 143, which terminates the prospective effect of the AT&T consent decree. In place of the decree, Congress created a transitional regulatory framework governing the BOCs' entry into certain new markets, both to ensure orderly progress towards full and fair competition in telecommunications and to give the BOCs a strong incentive to facilitate the realization of that goal.

Section 271 addresses BOC entry into the long-distance market. That provision automatically entitles all BOCs to provide, for the first time, "out-of-region" long-distance services: *i.e.*, long-distance services originating outside the States in which a BOC was authorized to provide local telephone service on the date of the statute's enactment. 47 U.S.C. 271(b)(2), (i).[3] Section 271 also introduces a procedure under which the BOCs may apply to the FCC for authorization to provide, also for the first time, full long-distance telephone service to customers within their "in-region" States. After "consult[ing]" with the relevant state public utility commission, and after both "consulting" with the Department of Justice and giving "substantial weight" to its views, the FCC is to grant a BOC's in-region long-distance application if it finds the following (47 U.S.C. 271(d)): (1) that the BOC has satisfied certain statutory requirements designed to open its local exchange market to competition (47 U.S.C. 271(c)); (2) that, for an interim period, the BOC will conduct its long-distance operations in accordance with the structural separation requirements of 47 U.S.C. 272;[4] and (3)

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[3] Section 271 also provides that the BOCs may immediately provide, to customers located anywhere in the country, "incidental" long-distance services, 47 U.S.C. 271(b)(3), including audio and video programming and commercial mobile services, "gateway information services" linking local customers to information service clearinghouses, and centralized signaling services. See 47 U.S.C. 271(g).

[4] The interim provisions of Section 272 require the BOCs to set up separate affiliates if they wish to engage in manufacturing, origination of most non-incidental in-region long-distance services, or long-distance information services other than electronic publishing or alarm monitoring. 47 U.S.C. 272(a) and (b); see also 47 U.S.C. 272(f) (sunset).

that granting the application would serve "the public interest, convenience, and necessity" (47 U.S.C. 271(d)(3)).

Section 273 separately authorizes a BOC to manufacture and provide telecommunications equipment once the FCC has found that the BOC has satisfied the conditions set forth in Section 271 for providing in-region long-distance service. Finally, Sections 274 and 275 impose short-term restrictions on the BOCs' electronic publishing and alarm monitoring services. Under Section 274, a BOC or BOC affiliate may not, until February 8, 2000, disseminate electronic publishing by means of the BOC's basic telephone service, except through a "separated affiliate" or joint venture. 47 U.S.C. 274(a), 274(g)(2). Section 275 requires BOCs that were not providing alarm monitoring services as of November 30, 1995, to wait until February 8, 2001, to begin doing so. 47 U.S.C. 275(a).

3. Petitioner SBC Communications Inc., through its wholly-owned subsidiaries (Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell), provides local telephone service to customers in Texas, Missouri, Oklahoma, Arkansas, Kansas, Nevada, and California. In April 1997, SBC filed an application under Section 271 to provide in-region long-distance telephone service in Oklahoma. The FCC denied the application on the ground that SBC had not satisfied Section 271's threshold competitive requirements. *In re Application of SBC Commun. Inc.*, 12 F.C.C.R. 8685 (1997), aff'd, 138 F.3d 410 (D.C. Cir. 1998).

Six days after the FCC's decision, SBC, along with its wholly-owned BOC subsidiaries and several other affiliates, filed this suit in the United States District Court for the Northern District of Texas, challenging the constitutionality of Sections 271 through 275. A

number of interested parties ultimately intervened. On December 31, 1997, the district court held that the challenged provisions were unconstitutional bills of attainder. Pet. App. 73a. In a subsequent order, the court stayed its decision pending appeal. *Id.* at 76a-77a.

The court of appeals reversed. The court first held that the challenged provisions of the 1996 Act are not "bills of attainder" because they do not "punish" the BOCs. *E.g.*, Pet. App. 31a-35a. The court also rejected petitioners' claims that the challenged provisions violate the separation-of-powers doctrine (*id.* at 35a-39a) and equal protection principles (*id.* at 39a).[5] Judge Smith, dissenting, would have invalidated the challenged provisions as bills of attainder. *Id.* at 41a-53a.

ARGUMENT

To date, two courts of appeals have ruled on the BOCs' bill-of-attainder challenge to the 1996 Act: the Fifth Circuit below, and the District of Columbia Circuit in *BellSouth Corp.* v. *FCC*, 144 F.3d 58 (1998). Those two courts reached the same conclusion. In *BellSouth*, the D.C. Circuit rejected many of the same arguments that petitioners present here, upheld the constitutionality of Section 274, and observed that the BOCs' constitutional claims were "somewhat undermined by § 274's placement in an Act that as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *Id.* at 66 (em-

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[5] The court of appeals also rejected a First Amendment challenge limited to Section 274. Pet. App. 40a (following *BellSouth*, 144 F.3d at 67-71). Petitioners have not sought this Court's review of that holding, and they have thus waived any First Amendment challenge. Sup. Ct. R. 14(1)(a).

phasis in original). The BOCs recently challenged Section 271 itself before another panel of the D.C. Circuit, and that case is pending. See *BellSouth Corp.* v. *FCC*, No. 98-1019 (D.C. Cir.) (argued Sept. 25, 1998). Unless and until petitioners persuade some court of appeals to depart from the current consensus, there is no need for this Court to consider petitioners' attack on integral provisions of an intricate legislative compromise that they themselves once supported (see Pet. App. 33a-35a).

1. A statute is a "bill of attainder" within the meaning of the constitutional prohibition only if it both applies with specificity *and* imposes punishment. *E.g.*, *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984). Those two elements are distinct: no regulation, no matter how specific, is a bill of "attainder" unless it is actually "punitive." See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 472-473 (1977); *BellSouth*, 144 F.3d at 64.

This Court employs a common-sense approach in determining what constitutes a "punitive" law for attainder purposes, focusing on "whether the challenged statute falls within the historical meaning of legislative punishment," on "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes," and on "whether the legislative record evinces a congressional intent to punish." See *Selective Serv. Sys.*, 468 U.S. at 852 (internal quotation marks omitted). "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960); see also *Selective Serv.*, 468 U.S. at 855-856 n.15.

The flaw in petitioners' bill-of-attainder challenge here is simple: nothing in the challenged provisions can plausibly be characterized as "punishment."

a. This Court has invalidated statutes as "bills of attainder" only five times in this Nation's history. In each of those cases, the legislature had imposed punitive disabilities on adherents of a despised political movement (either the Confederacy or the Communist Party) that was "thought to present a threat to the national security." *United States* v. *Brown*, 381 U.S. 437, 453 (1965); see also *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Pierce* v. *Carskadon*, 83 U.S. (16 Wall.) 234 (1872); *United States* v. *Lovett*, 328 U.S. 303 (1946). In each of those cases, the Court invalidated the legislation upon determining that the sanctions at issue—reflecting a "judgment censuring or condemning" individuals for their politics (*Brown*, 381 U.S. at 453-454)—were not reasonably related to a legitimate nonpunitive purpose. See, *e.g.*, *id.* at 454-455; *Lovett*, 328 U.S. at 314; *Cummings*, 71 U.S. at 319-320; *Garland*, 71 U.S. at 377-378; see also *Hawker* v. *New York*, 170 U.S. 189, 198 (1898) (discussing *Cummings* and *Garland*).

Nothing about the provisions at issue here resembles the legislation struck down in those five cases. Business regulations based on corporate economic power and incentives, unlike sanctions based on an individual's political affiliation, are a legal commonplace. See, *e.g.*, *Turner Broadcasting Sys.* v. *FCC*, 512 U.S. 622, 664 (1994). They rest not on a desire to "punish" the regulated corporations, but on a recognition of the objective dangers posed by monopoly power. See *North American Co.* v. *SEC*, 327 U.S. 686, 711 (1946).

Here, Congress recognized that the local exchange remains a crucial bottleneck facility for long-distance

and other services; that the BOCs "provide over 80% of local telephone service in the United States" (H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1, at 49 (1995)); and that, as under the consent decree, the distinctive geographical and demographic characteristics of the BOCs' markets justified competitive protections for those markets that were not needed elsewhere (see pp. 17-20, *infra*). Thus, at the same time that it released the BOCs from the prospective effect of the consent decree, Congress enacted Sections 271 through 275, both to give the BOCs incentives to open their monopoly markets to robust competition and, for a transitional period, to preserve a level playing field in the long-distance and other markets. See *SBC Communications Inc.* v. *FCC*, 138 F.3d 410, 412-413 (D.C. Cir. 1998); *BellSouth*, 144 F.3d at 65-66, 70; Pet. App. 7a. As a former FCC chairman told Congress, such restrictions were needed "not because the BOCs are venal," but because, in the absence of such provisions, "they would be following the natural instincts of rational businessmen" in using their monopoly power to defeat competition. *Telecommunications Policy Act (Part I): Hearings Before the Subcomm. on Telecomm. & Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 426 (1990) (testimony of Richard E. Wiley); accord H.R. Rep. No. 559, 103d Cong., 2d Sess., Pt. 1, at 50 (1994) ("as [the consent decree court] has stated, the line-of-business restrictions themselves are not punitive in nature, but are prophylactic measures") (internal quotation marks omitted).[6]

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[6] Petitioners suggest that the market-opening provisions of Sections 251 and 252 suffice to ensure local competition. See SBC Pet. 6-7, 20-21 n.8. That argument is without merit. While Sections 251 and 252 establish a general framework for opening

Those regulatory provisions are thus no more "punitive" in character than the many other statutes that exclude certain corporations from particular lines of business to protect competition or promote other economic goals. See *BellSouth*, 144 F.3d at 65.[7] Such line-of-business restrictions have never been thought to implicate the Bill of Attainder Clause, and for good reason: they do not "fall[] within the historical meaning

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local markets to competition, Congress recognized that those provisions would not achieve full competition overnight. See, *e.g.*, 141 Cong. Rec. S8138 (daily ed. June 12, 1995) (remarks of Sen. Kerrey); *id.* at S8161 (letter from State Attorneys General). Indeed, the FCC's most recent industry survey shows that the incumbent LECs have retained control of approximately 97.5% of all local exchange revenues. See FCC, *Telecommunications Indus. Rev.: 1997*, Tab. 4 (Oct. 1998) (lodged with this Court in No. 97-826). Congress recognized that, by linking removal of the remaining line-of-business restrictions to the development of local competition, the challenged provisions would give the BOCs an important economic incentive to facilitate the process of opening their traditional monopoly markets to full competition.

[7] *E.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (affirming FCC regulation proscribing cross-ownership of television station and newspaper in same market); Banking Act of 1933, 12 U.S.C. 24 (Seventh) (prohibiting banks from underwriting or issuing securities); Bank Holding Company Act, 12 U.S.C. 1843(a)(2) (prohibiting bank holding companies, with certain exceptions, from acquiring or retaining "direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company"); see also *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947) (upholding Section 32 of the Banking Act of 1933, which prohibits a partner or employee of a firm primarily engaged in securities underwriting from being a director of a national bank); Federal Credit Union Act, 12 U.S.C. 1759 (restricting federal credit union membership to groups having a common bond of association or occupation, or groups within a well-defined community); Credit Union Membership Access Act, Pub. L. No. 105-219, 112 Stat. 913.

of legislative punishment," and they obviously "can be said to further nonpunitive legislative purposes." *Selective Serv. Sys.*, 468 U.S. at 852; see also *Brown*, 381 U.S. at 453-454 (distinguishing the Banking Act of 1933, which rested on a "general knowledge of human psychology," from laws "censuring or condemning" individuals "thought to present a threat to the national security"). Indeed, petitioners cite *no* case in which any court has invalidated, as "punishment," any restriction on a corporation's entry into any kind of market, let alone entry by corporations as heavily regulated as those here. That fact, together with the very abundance of line-of-business restrictions throughout the national economy, belies petitioners' suggestion (*e.g.*, SBC Pet. 15, 23-24) that there could be something inherently or historically "punitive" about such restrictions.

Despite petitioners' efforts to equate the two (*e.g.*, SBC Pet. 14-15), therefore, economic regulation of this kind is a far cry from legislation designed to punish flesh-and-blood members of vilified political groups by prohibiting them from "practicing a profession" (*Lovett*, 328 U.S. at 315) The challenged provisions do not, of course, prohibit anyone from practicing any profession,[8]

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[8] In any event, even provisions that *do* prohibit individuals from practicing a profession are permissible "'when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing.'" *BellSouth*, 144 F.3d at 65 (quoting L. Tribe, *American Constitutional Law* § 10-5, at 655 (2d ed. 1988), in turn citing *Hawker*, 170 U.S. at 196, and *DeVeau* v. *Braisted*, 363 U.S. 144 (1960)). "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the

nor do they target disfavored political ideologies. Indeed, the challenged regulations do not specifically apply to any particular group of corporate managers or directors. For example, if a BOC were to sell off its network to some other company (say, GTE), that new company, as the "successor or assign" of the BOC (47 U.S.C. 153(4) (Supp. II 1996)), would be no less subject than the BOC itself to the in-region long-distance restrictions of Section 271. Conversely, when a BOC acquires an independent LEC, the 1996 Act does not prohibit the BOC from providing full in-region long-distance service in the newly acquired LEC's local service area (except in States that the BOC itself served before 1996). See 47 U.S.C. 271(i)(1). Those facts further confirm (if further confirmation were necessary) that Congress treated the BOCs differently from other companies because of the nature of the regional markets they serve (see pp. 17-20, *infra*), not because of any desire to "punish" them for misconduct.

b. Petitioners' characterization of the challenged provisions as "punishment" is particularly implausible for an independent reason as well. As the D.C. Circuit recently observed in rejecting the BOCs' bill-of-attainder challenge to Section 274, the 1996 Act "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *BellSouth*, 144 F.3d at 66 (emphasis in original). Even apart from the benefits the BOCs derive from a defined statutory procedure for full entry into in-region long-distance markets, see *ibid.*, the challenged provisions

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individual comes about as a relevant incident to a regulation of a present situation." *Flemming*, 363 U.S. at 614 (citation omitted).

immediately entitle the BOCs to provide, for the first time, long-distance service to customers outside their local service regions, 47 U.S.C. 271(a) and (b)(2); to provide "incidental" long-distance services to customers anywhere in the country, 47 U.S.C. 271(b)(3); and to play a significantly greater role in activities related to the manufacture of telecommunications equipment, 47 U.S.C. 273.

Indeed, the BOCs themselves have recognized that enactment of the challenged provisions, together with the termination of the consent decree, represents a net benefit for them. As the court of appeals explained (Pet. App. 33a-35a), the BOCs actively supported the Act while it was pending in Congress—not, of course, because they benefited from the local competition provisions (see pp. 3-4, *supra*), but because they very much benefited from the replacement of the consent decree with the new provisions of Sections 271 through 275. As this Court has indicated, legislation cannot be said to "punish" its subjects unless, at a bare minimum, it "depriv[es]" them of "rights * * * previously enjoyed." *Cummings*, 71 U.S. at 320. The most important provision challenged here—Section 271—does not even meet that threshold requirement. See also *BellSouth*, 144 F.3d at 66 (upholding the short-term provisions of Section 274 (see p. 6, *supra*) even though they reimpose certain electronic publishing restrictions that had recently been removed from the MFJ).

c. Because they cannot plausibly characterize the challenged provisions as "punitive," petitioners devote much of their discussion to the provisions' specificity, as though specificity alone could convert a nonpunitive statute into a bill of attainder. But that approach erroneously conflates two distinct issues. The need to show specificity and the need to show punitiveness are sepa-

rate requirements for any bill-of-attainder challenge, and there is "no warrant in the precedents for treating Congress's specification of the BOCs by name as a material element in the *punishment* analysis." *BellSouth*, 144 F.3d at 64 (emphasis added).

Indeed, much of petitioners' argument reads as though this Court had never decided *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). That case involved the constitutionality of a statute enacted shortly after President Nixon's resignation, in response to an agreement he signed regarding the disposition of his presidential records. *Id.* at 432. The statute overrode the agreement and established rules governing disposition of the records. The statute applied to no other records and repeatedly referred to the former President by name. *Id.* at 433-434. The "essence" of President Nixon's constitutional challenge to that statute, like the essence of petitioners' arguments here, was that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." *Id.* at 469-470.

The Court rejected that challenge and upheld the statute. It explained that President Nixon's expansive interpretation of the Bill of Attainder Clause "would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." 433 U.S. at 470. The Court observed that a variety of other valid statutes "also single out identifiable members of groups to bear burdens or disqualifications"; for example, in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court had upheld the "transfer of rail pro-

perties of eight railroad companies to [a] Government-organized corporation." 433 U.S. at 471 n.34. In sum, the Court concluded, just as "mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment * * * even if the law disadvantages an individual or identifiable members of a group," neither does "the mere specificity of a law * * * call into play the Bill of Attainder Clause." *Id.* at 471 n.33.

In *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court revisited this area and reaffirmed the central holding of *Nixon* and similar cases. A valid bill-of-attainder challenge, the Court explained, "requires not merely 'singling out' but also *punishment*." *Id.* at 239 n.9 (emphasis in original). In the absence of punishment, Congress may legislate not just with great specificity, but may in fact "legislate a legitimate class of one." *Ibid.* (internal quotation marks omitted). That principle is fatal to petitioners' bill-of-attainder claim here.[9]

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[9] The lower courts have also repeatedly rejected bill-of-attainder challenges to regulatory statutes directed at named entities. See, *e.g.*, *Fresno Rifle & Pistol Club, Inc.* v. *Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992) (rejecting bill-of-attainder challenge to California statute barring specific brands of assault weapons because "[t]he type of economic punishment about which [the weapons' manufacturers] complain is not of the type 'traditionally judged to be prohibited by the Bill of Attainder Clause'") (quoting *Nixon*, 433 U.S. at 475); *United Nuclear Corp.* v. *Cannon*, 553 F. Supp. 1220, 1226-1228 (D.R.I. 1982) (rejecting bill-of-attainder challenge to Rhode Island statute requiring specific nuclear power company to post $10 million decontamination bond); see also *Nixon*, 433 U.S. at 470-472 & nn. 33, 34; *Maine Cent. R.R. Co.* v. *Brotherland of Maintenance of Way Employees*, 813 F.2d 484, 488-491 (1st Cir.), cert. denied, 484 U.S. 825 (1987).

2. Petitioners challenge, on a variety of grounds, the substance of Congress's distinction between the local-exchange progeny of the Bell System (and "any successor or assign," 47 U.S.C. 153(4)), and the so-called "independent" local exchange carriers. As discussed, that challenge cannot help petitioners' bill-of-attainder claim, because they cannot meet their independent burden of showing that the provisions themselves are "punitive." See *BellSouth*, 144 F.3d at 67 ("the differential treatment of the BOCs and non-BOCs is neither suggestive of punitive purpose nor particularly suspicious"). Petitioners thus alternatively challenge the distinction under equal protection and separation of powers principles. As the court of appeals observed, however, the challenged provisions do "not even arguably" violate those principles. Pet. App. 41a.

a. It has long been settled that federal regulation of ordinary economic activity is consistent with the equal protection component of the Due Process Clause so long as there is a rational basis for any challenged classification. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Dandridge* v. *Williams*, 397 U.S. 471, 484-485 (1970). The provisions challenged here easily meet that test. See Pet. App. 39a.

The provisions establish transitional entry procedures for the companies that had previously been barred, under the AT&T consent decree, from the long-distance and related markets. As the House Energy and Commerce Committee explained, the statute "naturally focuses on the BOCs and their affiliates, because they uniquely [we]re seeking release from restrictions imposed under the MFJ." H.R. Rep. No. 559, *supra*, Pt. 1, at 50. Indeed, other LECs, including Cincinnati Bell, Southern New England Telephone, and Sprint, had already begun to provide long-distance service. See

USTA C.A. Br. 3-5. It was entirely rational for Congress to distinguish between companies that it was admitting into the long-distance market for the first time and companies that had always been free to provide long-distance service.

Congress also reasonably found that the BOCs' monopoly power continued to pose unique concerns for the development of competition, and that those concerns justified the creation of a transitional regulatory scheme in place of the restrictions of the now-vacated consent decree. As the House Judiciary Committee explained, "the Bells alone exercise immense local exchange monopoly power concentrated throughout a vast geographical region; the local exchange operations of even the Bells' closest runners-up are widely dispersed." H.R. Rep. No. 559, *supra*, Pt. 2, at 93.[10] For example, whereas "the BOCs are regions of contiguous states which together serve almost all of the large population centers in the country," H.R. Rep. No. 203, 104th Cong., 1st Sess., Pt. 1, at 32 (1995), "GTE serves less than three percent of America's urban markets," and its operations are chiefly located in "widely dispersed small- and medium-sized cities and suburban and rural territory." *Id.* at 31. For that reason, witnesses told Congress, special legislation was needed to protect competition only in traditional BOC markets: "The potential incentive and ability of a BOC, which

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[10] In evaluating the BOCs' market power, Congress appropriately took into account the fact that no BOC operates independently, because each is wholly owned and operated by a regional conglomerate (of which there were seven at the time of enactment, and of which there are now only five). See p. 2, *supra*. SBC's effort to compare the market power of a hypothetically divested Nevada Bell with that of other local exchange carriers (Pet. 21 n.9) is thus without merit.

controls nearly one-seventh of the country, to disadvantage a competing interexchange competitor, is far greater than for other companies that offer both local and interexchange service." *The Role of the Department of Justice: Hearing Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 66 (1995) (testimony of then-Assistant Attorney General Bingaman);[11] see also *BellSouth*, 144 F.3d at 67 ("the differential treatment of the BOCs and non-BOCs" in Section 274 is "quite reasonable").

Finally, the distinction Congress drew—between the corporate successors to the Bell System monopoly and the "independent" telephone companies—was of course the same distinction drawn for many years by the district court that had entered the AT&T and GTE consent decrees. See pp. 2-3, *supra* (discussing basis for decree restrictions). For example, in approving GTE's acquisition of Sprint over objections that GTE should be subject to the same type of restrictions imposed on

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[11] See also *ibid.* ("Even GTE, the largest of the independent companies, generally serves non-urban areas, and its local operations are geographically dispersed. That is why the BOCs were subject to the line-of-business restrictions while GTE was allowed to offer long distance services through a separate subsidiary."). A variety of witnesses emphasized the importance of this distinction. See, *e.g.*, H.R. Rep. No. 850, 102d Cong., 2d Sess, at 93 (1992) (quoting testimony of Professor Monaghan) ("As courts have found, each of the RBOCs has market power significantly greater than the only other comparably sized local exchange carrier, in that GTE's widely dispersed exchanges are primarily rural and suburban in character and otherwise differ from the RBOCs.") (footnotes omitted); *Competitive Status of the Bell Operating Companies: Hearing Before the Subcomm. on Telecomm., Consumer Protection, and Fin. of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 86 (1986) (testimony of then-Assistant Attorney General Douglas H. Ginsburg) (similar).

the BOCs by the AT&T Consent Decree, the district court explained: "Each of the regional [Bell] companies has a very strong, dominant position in local telecommunications in the area in which it serves; GTE's operations, by contrast, are widely scattered." *United States* v. *GTE Corp.*, 603 F. Supp. 730, 737 (D.D.C. 1984). Congress's rationale in enacting Sections 271 through 275 was no less reasonable.[12]

b. Petitioners further argue (SBC Pet. 26; Bell Atl. Pet. 17-23) that the 1996 Act violates separation-of-powers principles because it alters the prospective

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[12] Petitioner Bell Atlantic contends (Pet. 24-28) that economic legislation cannot identify regulated parties by name without violating equal protection guarantees. That argument is irreconcilable with modern equal protection principles, as the court of appeals recognized (Pet. App. 39a). See, *e.g.*, *New Orleans* v. *Dukes*, 427 U.S. 297, 306 (1976) (upholding legislation making special provision for two vendors as against other vendors and overruling *Morey* v. *Doud*, 354 U.S. 457 (1957), "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds"); *Maine Cent. R.R.*, 813 F.2d at 488-491 (refusing to apply heightened scrutiny to legislation "'select[ing] a single person for adverse treatment,'" and holding that, under this Court's precedent, a "classification does not become irrational or unconstitutional solely because it is specific"); see also *Plaut*, 514 U.S. at 239 & n.9 (discussed at pp. 21-22, *infra*); *Nixon*, 433 U.S. at 471 & n.33; *Erb* v. *Morasch*, 177 U.S. 584, 586-587 (1900). Bell Atlantic's reliance (Pet. 27) on the government's brief in opposition to certiorari in *Atonio* v. *Wards Cove Packing Co.*, 513 U.S. 809 (1994) (denying certiorari), is similarly without merit. *Atonio* involved the validity of a provision in a civil rights statute that provided "the plaintiffs in one pending case with significantly less protection against discrimination * * * than the plaintiffs in any other pending case." 98-1767 U.S. Br. in Opp. at 8. The government's filing expressly distinguished the civil rights legislation at issue there from a provision (such as the ones challenged here) that is "solely an economic regulation." *Ibid.*

equitable terms of the AT&T consent decree—albeit, "as a whole," to the *benefit* of the BOCs themselves (*BellSouth*, 144 F.3d at 66). As an initial matter, that argument conspicuously ignores the fact that the only provision of the 1996 Act that directly addresses the consent decree is Section 601(a)(1), 110 Stat. 143, which terminates the decree's prospective effect. Petitioners obviously do not object to that provision. In any event, even if we place that anomaly to one side (see pp. 23-24, *infra*), petitioners' separation-of-powers argument is without merit.

As the court of appeals explained, "Congress may change the law underlying ongoing equitable relief, even if * * * the change is specifically targeted at and limited in applicability to a particular injunction, and even if the change results in the necessary lifting of that injunction." Pet. App. 36a (emphasis omitted). That proposition is firmly rooted in this Court's precedents. In *Pennsylvania* v. *Wheeling and Belmont Bridge*, 59 U.S. (18 How.) 421, 429, 431-432 (1855), the Court upheld a law declaring a particular bridge to be a lawful post road despite a judicial decree to the contrary. Similarly, in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), the Court upheld a statute changing the law that governed two expressly named, pending lawsuits. Finally, in *Plaut*, while invalidating a statute that "*retroactively* command[ed] the federal courts to *reopen* final judgments" (514 U.S. at 219 (emphasis added)), the Court took care to reaffirm the constitutionality of provisions, like those at issue in *Wheeling Bridge* and here, that merely "alter[] the *prospective* effect of injunctions entered by Article III courts" (*id.* at 232 (emphasis added)).

Plaut also refutes petitioners' "not-too-well-defined argument" (Pet. App. 38a) that the specificity of the

challenged provisions could somehow offend separation-of-powers principles even if it does not violate the Bill of Attainder Clause. The problem with the statute at issue in *Plaut*, the Court held,

> consists *not* of the Legislature's acting in a particularized and hence (according to the concurrence) nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized * * *, or that it is not accompanied by an 'almost' violation of the Bill of Attainder Clause, or an 'almost' violation of any other constitutional provision.

514 U.S. at 239. Specificity itself, the Court reaffirmed, does not make a statute unconstitutional: "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action." *Id.* at 239 n.9. Finally, *Plaut* forecloses the distinction, reasserted here by Bell Atlantic (Pet. 26), between statutes conferring benefits on designated individuals and those imposing burdens on them. The Court explained (514 U.S. at 239 n.9): "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also *punishment*, see, *e.g.*, [*Lovett*, 328 U.S. at 315-318], and a case which says that Congress may legislate 'a legitimate class of one,' [*Nixon*, 433 U.S. at 472]." See also *Maine Cent. R.R. Co.*, 813 F.2d at 488-491 (discussed in note 12, *supra*).

3. Bell Atlantic (Pet. 28) encourages the Court to "take the whole case and decide, as well, the severability of the Special Provisions." In fact, that severability issue need never be decided, because the provisions at issue are constitutional. If that were not the case, however, and if those provisions were invalidated, the severability question would indeed become exceptionally urgent.

Invalidation of Sections 271 through 275 would plainly require invalidation of the other major provision of the 1996 Act applicable specifically to the Bell Companies: Section 601(a)(1), which prospectively terminates the effect of the AT&T consent decree. See 110 Stat. 143. That provision and Sections 271 through 275 were enacted together as inextricably related components of "a hard-fought compromise on a massive issue of public policy which, in the end, contained both good and bad elements for the BOCs." Pet. App. 33a; *SBC Communications*, 138 F.3d at 412 (content of 1996 Act "was the subject of great debate," and "[t]he end product was a compromise between the competing factions"). Petitioners cannot plausibly contend (cf. Bell. Atl. Pet. 29) that it would effectuate congressional intent to lop off only the portions of that "hard-fought compromise" that the BOCs dislike. See *BellSouth*, 144 F.3d at 66 n.8.[13] Indeed, if petitioners really believe that

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[13] In passing, Bell Atlantic cites Section 708 of the Communications Act of 1934, 47 U.S.C. 608, which provides as a general matter that invalidation of one provision of the Act shall not affect "the remainder of the Act." See Bell Atl. Pet. 28. (As codified, the word "Act" appears as "chapter"—Chapter 5 of Title 47—which essentially encompasses the Communications Act. See 47 U.S.C. 609.) Bell Atlantic had good reason to give Section 708 only a perfunctory "see also" citation: Unlike most other provisions of the 1996 Act, Section 601(a)(1) of that Act is *not* codified with the

Congress wanted to "punish" them by subjecting them to more onerous conditions than those that existed under the consent decree, they cannot seriously argue at the same time that Congress would have wished to set them free from continuing judicial oversight in the absence of statutory regulation.

Bell Atlantic suggests (Pet. 28) that if invalidation of Sections 271 through 275 would require invalidation of Section 601(a)(1), it would also require invalidation of all the common carrier provisions of the 1996 Act, including the very provisions that this Court is now reviewing in *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826, and consolidated cases. We disagree with that proposition, but we note the following inescapable point. If successful, petitioners' challenge would threaten to unravel much of the 1996 Act, to the great detriment of American consumers.[14] The result of that unraveling could be a return to a telecommunications world dominated by judicial decrees rather than positive lawmaking by Congress and its delegates. Review

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Communications Act, but is merely referred to in the codifier's historical notes. See 47 U.S.C. 152 note (Supp. II 1996). In any event, even if Section 601(a)(1) of the 1996 Act were part of the Communications Act, the obvious interrelationship between that provision and Sections 271 through 275 would rebut any contrary presumption of severability created by 47 U.S.C. 608. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

[14] Petitioners mistakenly invoke the interest of consumers as a basis for granting them full and immediate entry into the long-distance market. SBC Pet. 30. There are two short answers to that argument. First, Congress resoundingly rejected petitioners' view of the best way to promote consumer interest in the long run. Second, invalidation of that congressional judgment would not in any event give petitioners the windfall that they seek for themselves, because, as discussed, Section 601(a)(1) is inseverable from the provisions that petitioners challenge.

of the severability question would be only the first step in a very long process of litigation.

Fortunately, however, this Court need not accept Bell Atlantic's invitation to grant certiorari on that severability question, because there is no reason for the Court to consider petitioners' underlying claims on the merits. As explained above, those claims are unsound. And, so long as the courts of appeals maintain their current consensus to that effect, further review by this Court is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOEL I. KLEIN
Assistant Attorney General
PHILIP D. BARTZ
Acting Assistant Attorney General
MARK B. STERN
JACOB M. LEWIS
ALISA B. KLEIN
DANIEL L. KAPLAN
DANA J. MARTIN
Attorneys

CHRISTOPHER J. WRIGHT
General Counsel
JOHN E. INGLE
Deputy Assistant General Counsel
Federal Communications Commission

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October Term, 1998

SOUTHWESTERN BELL COMMUNICATIONS, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE TEXAS JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

ALLAN E. PARKER, JR.
State Bar No. 15505500
Counsel of Record
R. CLAYTON TROTTER
State Bar No. 20240500
TEXAS JUSTICE FOUNDATION
8122 Datapoint Dr., Suite 812
San Antonio, TX 78229
Phone: (210) 614-7157
Fax: (210) 614-6656

Attorneys for Amicus Curiae Texas Justice Foundation, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23RP

MOTION OF TEXAS JUSTICE FOUNDATION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

TO THE HONORABLE COURT:

COMES NOW, TEXAS JUSTICE FOUNDATION (TJF) and files this Motion for Leave to File Brief as Amicus Curiae.

The TEXAS JUSTICE FOUNDATION ("TJF") is a 501(c)(3) charitable non-profit law firm that has as its mission the protection, in the public interest, of private property rights and the free enterprise system against unconstitutional government interference or exercise of government power in an inordinate and unreasonable manner, thus limiting government to its appropriate role in society.

Accordingly, the Texas Justice Foundation involves itself in cases that it considers to be landmark, or potentially landmark, in an effort to accomplish that mission. In keeping with its mission, the Texas Justice Foundation files this amicus brief because of its interest in ensuring that Texas' consumers reap the benefits of full competition in the long distance telephone market, as well as in the local calling market. Full competition means lower costs for telephone service to Texas' consumers. With full competition in both markets, consumers in Texas will have more choices to select the kind of telephone service they want.

A party may seek leave of this Court to file a brief as amicus curiae on issues raised by the case. Rule 37.2(b). Because of the significance and importance of this case, the number of interested parties is quite large. The following have consented to the filing of this Amicus Brief: Association for Local Telecommunications Services,

AT&T, MCI, Bell Atlantic Corporation, National Cable Television Association, Southwestern Bell Communications, and Sprint Communications Company, L.P. While not expressly objecting, the following parties have not responded to the Texas Justice Foundation's request for consent: The U.S. Department of Justice on behalf of Federal Communications Commission, Competitive Telecommunications Association, Keith Maydak, and Telecommunications Resellers Association. The Texas Justice Foundation did attempt to reach all parties in writing or by telephone. The TEXAS JUSTICE FOUNDATION possesses the requisite interest in the outcome of this case and TEXAS JUSTICE FOUNDATION's participation will not prejudice any party to this litigation. The TEXAS JUSTICE FOUNDATION filed an Amicus Brief before the Trial Judge and the Fifth Circuit Court of Appeals in this case without opposition by any party.

The TEXAS JUSTICE FOUNDATION, therefore moves this Court for leave to file a brief as Amicus Curiae, and asks this Court to accept for filing the attached Brief of Amicus Curiae TEXAS JUSTICE FOUNDATION, Inc. in Support of the Petition for Writ of Certiorari on this the 19 day of November, 1998.

Respectfully submitted,

ALLAN E. PARKER, JR.
Texas Bar #15505500
CLAYTON TROTTER
Texas Bar #20240500
TEXAS JUSTICE FOUNDATION
8122 Datapoint Dr., Suite 812
San Antonio, Texas 78229
Telephone: (210) 614-7157
Facsimile: (210) 614-6656

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Texas Justice Foundation ("TJF") is a Texas 501(c)(3) charitable non-profit litigation and education foundation that has as its mission the protection, in the public interest, of fundamental economic liberty, private property rights, and the free enterprise system against unconstitutional government interference or exercise of government power in an inordinate and unreasonable manner, thus limiting government to its appropriate role in society.[1]

Accordingly, the Texas Justice Foundation involves itself in cases that it considers to be landmark, or potentially landmark, in an effort to accomplish that mission. In keeping with its mission, the Texas Justice Foundation files this amicus brief because of its interest in insuring that Texas' consumers reap the benefits of full competition in the long distance telephone market, as well as in the local calling market. Full competition means lower costs for telephone service to Texas' consumers. With full competition in both markets, consumers in Texas will have more choices to select the kind of telephone service they want.

In placing an unlawful burden on Bell Operating Companies, Congress has needlessly harmed consumers and frustrated national public policies of competition,

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

liberty, and the principle of nondiscrimination in the marketplace.

The interest of the public at large will be significantly impacted for good or ill by the outcome of this case, and the costs to the public will be enormous if the plaintiffs are not allowed to compete in the relevant markets. It is the interest of the people which should be paramount in the administration of justice, as Abraham Lincoln stated on that great battlefield that "government of the people, by the people and for the people" should continue and prosper in the world. Texas Justice Foundation's interests, and the interests of the public, will thus be significantly affected by the outcome of this appeal.

REASONS FOR GRANTING THE PETITION

I. THE CASE RAISES FUNDAMENTAL QUESTIONS ABOUT THE STRUCTURE OF "OUR FEDERALISM" IN THE CONTEXT OF CONGRESSIONAL USURPATION OF JUDICIAL AUTHORITY IN AN "UNUSUALLY IMPORTANT LEGISLATIVE ENACTMENT"

The Fifth Circuit's opinion creates and amplifies a prophylactic exception that would essentially eviscerate the Bill of Attainder clause of the Constitution. If the Fifth Circuit's decision is allowed to stand, Congress may feel free to cave in to political pressure and special interests and pass more legislation that is not general, but allows some individuals to participate in some markets, but not others. The pressure of lobbying and political influence peddling would become irresistibly intense. The Bill of

Attainder clause is designed as a simple, easy to apply bar against such abuse.

The Bill of Attainder clause has not seen extensive litigation, just as the prohibition against quartering troops in homes has not. Until the Fifth Circuit's decision below, both were clearly prohibited by the Constitution. If this case is not taken, Congress will be emboldened to succumb to the temptations that produced this Bill of Attainder. Instead of market freedom and competitive pressure, with a level playing field, open to all, determining who is successful, we will have legislatures determining the market winners and losers.

Thomas Jefferson wrote in a letter to James Madison on the 20th of December, 1787, that:

> "A Bill of Rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference."

In his *Collection of Essays, No. III*, in 1788, Noah Webster wrote:

> "A Bill of Rights against the encroachment of an elective legislature, that is, against our *own* encroachments on *ourselves*, is a curiosity in government." (emphasis in original)

Like the Bill of Rights, the prohibition of Bills of Attainder was intended to protect ourselves from ourselves. The founding fathers sought, by the separation of powers into executive, legislative, and judicial departments, and by the adoption of the Constitution and Bill of Rights, to prohibit all excessive concentrations of power

in any one function of government, even to the protection of ourselves from ourselves.

At the time of the American Revolution, and for some centuries prior to that time, the Parliament of Great Britain had utilized Acts of that body which imposed penalties, even the death penalty, on subjects of the Crown. Article 1, Section 9, Clause 3 of the U.S. Constitution forbids the federal government from passing Bills of Attainder and Ex Post Facto Laws or impairing the obligations of contracts. Article I, Section 10, Clause 1 impose the same prohibition on the states.

Such enactments violate principles deeply embedded in our constitutional structure. The Constitution separates the judicial power from the legislative power. *See City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). Legislative bodies are supposed to enact general rules, applicable to all persons or certain classes of people, which grant rights to them or impose duties on them. It is the function of the judicial branch to decide, *under due process procedures containing safeguards*, including the rules of procedure and evidence, whether a specific person or corporation is entitled to a right, or subject to a duty, or penalty established by the legislature. Bills of Attainder are contrary to these principles. They inflict legislative punishment ignoring judicial methods of proof designed to insure fairness in fact-finding. The history of Bills of Attainder has also shown that their passage was often induced by popular passion or motivated by unproved suspicions or special interests.

Likewise, in this case, Congress has selected specifically by name 20 corporate persons, no more, no less,

and imposed upon them restrictions on their freedoms of liberty, association, speech and enterprise that are imposed on no other corporations in the United States. Such an enactment is a Bill of Attainder and should be, for the reasons and based upon the authorities set forth below, declared by the Court to be Unconstitutional and Void.

The Texas Justice Foundation agrees with the Petitioners, SBC Communications, Inc., et al., that §§ 271-275 of the Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56 (1966), are unconstitutional.

Telecommunications Act §§ 271-275, entitled "Special Statutory Provisions Concerning Bell Operating Companies," prohibit specifically named companies and, in particular, the largest phone company in Texas, and no others, from engaging in certain businesses and forms of speech. By their express terms, the "Special Statutory Provisions" prohibit the named Bell Operating Companies from competing in enormously important markets: long-distance services, equipment manufacturing, and electronic publishing.

Congress simply does not have the authority to single out a handful of named companies and punish them alone because of a legislative judgment about the merits of a prior lawsuit, or because of their potential to break the law in some remote future. While Congress has the broad power to enact rules of general application, the Legislature has no authority to sit as judge and jury over individual companies. Congress ignored that foundational precept in drafting the Special Statutory Provisions and, in so doing, violated the Bill of Attainder Clause.

The "Special Statutory Provisions" are hurting America's consumers and economy by suppressing competition, and such a public policy consideration is of enormous significance.

These detrimental consequences are unconstitutional and should be overturned.

A. THE ACT VIOLATES THE BILL OF ATTAINDER CLAUSE

The 1996 Telecommunications Act's (the "Act") "Special Statutory Provisions" are modeled after certain restrictions placed on the Bell Operating Companies by a consent decree in *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131, (D.D.C. 1982), aff'd sub nom., *Maryland v. United States*, 460 U.S. 1001 (1983).

The consent decree required the American Telegraph and Telephone Co. ("AT&T") to divest its 20 Bell Operating Companies and prohibited those companies from engaging in certain lines of business. The decree provided that the Bell Operating Companies could not provide interchange (via long-distance) services, manufacture telecommunications equipment, offer information services (including electronic publishing), or many other products or services. *Id.* 552 F. Supp. at 227. Under the terms of the decree, a Bell company could petition the "AT&T" district court to lift the restrictions, and the district court often exercised its authority to grant such waivers.

The "Act" completely overhauled federal telecommunications regulation and, in so doing, eliminated the decree's restrictions and obligations. In effect, the "Act"

usurped the Court's role and eliminated restrictions to local exchange competition. Furthermore, the "Act" stripped the Bell companies of any monopoly position and reimposed many of the consent decree line-of-business restrictions in the form of the "Special Statutory Provisions."

In these provisions, Congress singled out the Bell Operating Companies, alone and by name, for a series of special burdens not applicable to any other incumbent local exchange carrier. Section 271 of the "Act" prohibits the named companies from offering consumers long-distance service where the company offers local exchange service; § 273 prohibits the same companies from manufacturing and providing telecommunications equipment to consumers; § 274 bans the companies from providing consumers electronic publishing materials; and § 275 prohibits the companies from providing consumers alarm-monitoring services. In each case, the Bell Operating Companies may not serve consumers in the specified line of business for a period of years, or until certain conditions precedent are met, to the satisfaction of the government. In essence, the parties that were once reporting to the Court after a trial and agreed settlement are now reporting to the executive branch by congressional fiat regarding provisions to which they had not agreed.

The Bill of Attainder Clause of the United States Constitution broadly protects private persons from punitive legislative measures imposed without judicial process. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed."). The clause forbids Congress from passing "a law that legislatively determines

guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977); *See also United States v. Brown*, 381 U.S. 437 (1965).

The Supreme Court has recently rearticulated the importance of the structural division of power in our Constitution as a protection of fundamental individual liberties in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1264 (1995). While *Lopez* did not specifically deal with Bills of Attainder, *Lopez* did deal with the fundamental, structural, separation of powers that reflects the same limitation of power embodied in the Bill of Attainder provision. *Lopez* states:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See U.S. Const. Art. 1, § 8.* As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the

> Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.* 514 U.S. 549, 552, 115 S.Ct. 1624, 1626.

The Fifth Circuit's judicially created prophylactic exception to the Bill of Attainder prohibition is just as susceptible to expansion (and thus abuse of individual liberty) as the Government's commerce clause argument in *Lopez*, supra. This is an individual liberty case which is just as important as any free speech or other case of fundamental liberty. But the Government's argument of a prophylactic effect would always apply to any Bill of Attainder and instead of limiting government power as the Framers intended, it would in fact allow unlimited expansion of government and destruction of individual liberty. Economic freedom is as important as free speech and just as valuable in many ways.

The Court's reasoning in *Lopez* is just as applicable to this case:

> "We pause to consider the implications of the Government's arguments. The Government admits, under its 'costs of crime' [read prophylactic] reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime [read anticompetitive behavior], regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to

> perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. 549, 564, 115 S.Ct. 1624, 1631.

The Court must be active in protecting those rights which are specifically in the Constitution, such as freedom from Bill of Attainders, not creating new rights. The right not to be singled out for punishment by the legislature is clearly and expressly guaranteed in the Bill of Attainder clause. This means that there must be judicially enforced limits on the powers of Congress, no matter that this introduces some uncertainty. As *Lopez* says:

> "The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See U.S. CONST., Art I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty "to say what the law is." *Marbury v. Madison*, 1 Cranch. 137, 177, 2 L.Ed. 60 (1803) (Marshall, C.J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers." 514 U.S. 549, 566, 115 S.Ct. 1264, 1633.

1. The "Act" Violates the Bill of Attainder Clause Because It Selectively Bars Private Parties from Pursuing Their Chosen Professions.

Since the ratification of the Constitution, the most common variety of unconstitutional Bill of Attainder has been that which prohibited private parties from pursuing employment in the industry of their choice. *See Brown*, 381 U.S. 437 (forbidding members of the Communist Party from serving as officers or nonclerical employees of labor unions); *United States v. Lovett*, 328 U.S. 303 (preventing three named individuals from being paid for federal employment); *Ex parte Garland*: 71 U.S. (4 Wall.) 333 (1867) (barring those who had served with the Confederacy from legal practice in federal court); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (barring those who had served with the Confederacy from working as priests).

The "Act", essentially a shopping list of prohibitions forbidding the named local telephone exchange companies from conducting various businesses, demonstrates in vivid detail why the Constitution does and should reserve the authority to punish to the judicial branch of the government, rather than to its political branches. Some of the prohibitions (47 U.S.C. §§ 271, 273) replicate in some manner the prohibitions of the AT&T consent decree: some (47 U.S.C. § 274) track in part restrictions removed from the decree years ago; and others (47 U.S.C. §§ 275, 276) bear no relationship to anything other than the ability of lobbyists to convince the legislature of the merits of their particular claims. The purported rationale of all of these restrictions remains unitary – to allay

suspicions that the named local telephone exchange companies would not comply with the provisions of the Act that require them to open their local networks to competition (47 U.S.C. §§ 251, 252).

If this suspicion were all that is required for Congress to allocate markets and market shares or proscribe certain lines of business for companies, then of what relative value are the antitrust laws? For example, Congress could simply order Microsoft not to enter a web browser market and give it to Sun Microsystems or Netscape. Congress could tell General Motors not to produce Corvettes and allow Ford and Chrysler to be the only producers of sports cars, specifically Mustangs and Vipers. After all, Microsoft is so big it "might be" violating the antitrust laws, and General Motors likewise.

The prohibitions of the 1996 Telecommunications Statute, while constitutional in the exercise of judicial power, with its attendant rights to counsel, compelling witnesses and jury trial, are unconstitutional prohibitions in a legislative decree. Given the absurdity of the above examples, it is clear why legislation like this is an abuse of congressional authority.

2. The Special Provisions Punish the Bell Operating Companies

The primary inquiry in determining whether a constraint qualifies as punishment for these purposes is historical – whether it is the type of sanction that has traditionally been understood to fall within that category. *See, e.g., Nixon,* 433 U.S. at 473-75. In this context, that inquiry is an easy one. For well over a hundred years, the

Supreme Court has held that disabilities of the very kind at issue here – prohibitions on individuals or groups engaging in a specific business or profession – constitute punishment. Indeed, "legislative enactment[s] barring designated individuals or groups from participation in specified employments or vocations have been a primary focus of the Bill of Attainder Clause." *Id.* at 474.

Other cases emphasize this same, crucial point. *See Selective Service System*, 468 U.S. at 852 ("the list of punishments forbidden by the Bill of Attainder Clause . . . include[s] legislative bars to participation by individuals or groups in specific employments or professions"); *Brown*, 381 U.S. at 448 ("Disqualification from the pursuits of a lawful avocation" constitutes punishment) (quoting *Cummings*, 71 U.S. at 320); *Lovett*, 328 U.S. at 316 (permanent bar on government employment "is punishment, and of a most severe type"). As the Court explained long ago, "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct . . . All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder." *Garland*, 71 U.S. at 377.

The clarity and significance of these precedents is violated by the Fifth Circuit's decision below. The kind of restriction imposed here – preventing Southwestern Bell, Pacific Bell, Nevada Bell, and the other Bell Operating Companies from pursuing billions of dollars worth of lawful business opportunities – has historically been understood to constitute punishment that may not be

imposed on entities that Congress has singled out by name without a judicial trial.

3. The Act Punishes the BOC's by Restating Prior Punishment

If the Bill of Attainder Clause does not apply where Congress restates prior judicial punishment, or it has some "prophylactic" purpose, then such a rule would be inconsistent with the purpose of the clause: "[T]he Bill of Attainder Clause . . . reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 381 U.S. at 445. Nothing in the history of the clause suggests that Congress is more at liberty to punish after the judiciary has acted than before. *See id.* at 442-46 (reviewing history and early application of clause). Trial by legislature is unconstitutional even if it merely restates a sentence. It would be clearly unconstitutional for Congress to pass a law sentencing a named individual to a sentence of 15 years with a special parole term of 15 years because a judge had previously sentenced the same person to 12 years and 12 years of special parole. In the instant case, while the Court still had jurisdiction, it could alter the judgment; Congress cannot merely substitute itself for sentencing or supervising judges. Such action seriously jeopardizes the distinctive role of the courts in the constitutional framework.

The provisions do not channel behavior, but rather rest on a congressional finding of future guilt based on an

unstated finding of past taint. Such activity is adjudication. "Under our Constitution,. . . . [however,] the task of adjudication must be left to other tribunals." *Brown*, 381 U.S. at 461. The proper remedy for a hypothetical failure by a BOC to comply with antitrust laws is enforcement action by the executive before the judicial branch – not the peremptory imposition of punishment by Congress. Congress simply took the case away from the courts, and while Congress does have the power to establish the jurisdiction of the courts, it may not do so with a prospective finding of guilt.

The Act denies the affected Companies the right to employment of their choice, a punishment traditionally judged to be prohibited. The Act serves no other purpose. It is designed solely to reach that particular end. The Act was clearly motivated by a desire to punish. The Act violates the Bill of Attainder Clause.

II. THE FIFTH CIRCUIT'S DECISION DESTROYS FREE MARKETS AND NEEDLESSLY HURTS TEXAS CONSUMERS

Congress established, and the divided Fifth Circuit panel has now upheld, in the "Special Statutory Provisions," a set of anti-competitive prohibitions and restraints on Bell Operating Companies' entry into new markets, in some cases even going beyond the conditions imposed by the consent decree of the Court. Instead of creating a "single set of rules for" the Bell Operating Companies and their competitors, Congress targeted the "Special Statutory Provisions" only at the Bell companies.

Restrictions such as those in the "Special Statutory Provisions" carry heavy social costs in terms of job growth, the economy, and consumer benefits, which this Court must protect. This Court is the ultimate protector of economic liberty under our Constitution. That role cannot be abdicated without great peril. Deference to the Congress is not appropriate where they have clearly singled out companies by name for adverse consequences. Finally, relief from the line-of-business restrictions will benefit consumers by producing lower rates, higher quality, and more choice in telecommunications. Quoting from the Trial Brief of the Communications Workers of America at p. 9:

> " 'CWA' estimates that allowing the Bell Companies into markets now foreclosed by the Special Statutory Provisions will result in price declines of 22% on average for all telecommunications services. That means consumers will save $63 billion per year on telephone and cable bills, freeing that amount of income for the purchase of other products and services."

A significant portion of those savings would be to Texas consumers. Again, quoting from the Communication Workers of America Brief at p. 10:

> "The long-distance markets have brought great rewards, stating that the recent successes of SNET and GTE in attracting customers for their long distance services illustrates the ability of local carriers to garner a significant share of the long distance market. Rapidly, SNET and GTE have captured market share in their regions through aggressive price competition that has directly benefited consumers. Professor Jerry Hausman has estimated that SNET's overall

> rates average 18% lower than AT&T's overall rates (including AT&T's discount plans) and that GTE's average 17% lower. Other parts of the country will enjoy similar savings when the Bell Operating Companies are allowed to provide long-distance service."

The Bell Operating Companies were singled out by name, rather than on all companies exhibiting general characteristics. Congress made plain that those provisions are based on a legislative judgment as to those entities – as to their alleged past behavior or propensity for misconduct in the future – and not on any judgment regarding a generic problem that needed to be addressed by legislation. The Special Statutory Provisions thus were not intended to, and in fact do not, serve a legitimate federal objective. Rather, they act as unconstitutional punishment of certain named companies.

The unconstitutionality of the "Special Statutory Provisions" requires, we respectfully submit, that the Court affirm the decision of the trial court and reverse the Fifth Circuit. In the process, the Court will also benefit consumers in Texas with an improved economy, and lower priced, higher quality telecommunications goods and services.

The "Act" is a Bill of Attainder and is therefore unconstitutional. This is a case of national importance.

CONCLUSION

For *the above stated* reasons, as well as those stated by the Petitioners, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

ALLAN E. PARKER, JR.
Texas Bar # 15505500
R. CLAYTON TROTTER
Texas Bar # 20240500
TEXAS JUSTICE FOUNDATION
8122 Datapoint Dr., Ste. 812
San Antonio, Texas 78229
Telephone (210) 614-7157
Fax: (210) 614-6656

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IN THE
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OCTOBER TERM, 1998

SBC COMMUNICATIONS, INC. et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF TEXAS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DEBORAH A. VERBIL
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

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INTEREST OF AMICUS CURIAE STATE OF TEXAS

Pursuant to Supreme Court Rule 37.4, the Attorney General of the State of Texas submits this amicus curiae brief on behalf of the State of Texas ("Texas").

Competition in the telecommunications industry, its benefits to consumers, and, consequently, the Fifth Circuit's decision, all have

critical implications to the State of Texas. Texas plays a key role in the development of competitive markets for telecommunications services in the State. The Telecommunications Act itself, in Sections 251 through 253, entrusts to the States critical regulatory responsibility for opening these markets. More generally, Texas, primarily through its Attorney General, is the principal enforcer of state and federal antitrust laws at the State level. As the principal law enforcement authority in the areas of antitrust and consumer protection, Texas has a compelling interest in ensuring that its citizens, as consumers, reap the significant benefits offered by open competition in the telecommunications marketplace.

The central legal question presented by the petition for certiorari is whether Sections 271 through 275 of the Telecommunications Act, the "Special Provisions," violate the Constitution's prohibition against bills of attainder. Texas believes that the Special Provisions - far from furthering competition or helping consumers - undermine competition and seriously harm Texas citizens. For these reasons, Amicus State of Texas urges the Court to grant the petition for writ of certiorari.

SUMMARY OF ARGUMENT

This brief does not address the constitutional issues raised by Petitioners; Texas concurs in Petitioners' constitutional arguments. Instead, Texas submits this amicus brief to make three additional points. First, the Texas Public Utility Commission ("PUC") expends substantial resources in fulfilling its consultative responsibilities under section 271. Texas has a significant interest in having the constitutionality of the Special Provisions resolved before it makes further, potentially unnecessary, expenditures.

Second, the Special Provisions harm Texas consumers and the Texas economy. Empirical evidence shows that where local telephone companies have been allowed to provide long-distance service, customers have received not only the convenience of

"one-stop shopping," but also substantial reduction in long-distance rates.

Third, the Special Provisions are not necessary to protect local competition. Well before the United States Congress passed the Telecommunications Act of 1996, Texas had enacted legislation opening Texas telecommunications markets to competition. Adequate regulatory safeguards - both at the state and federal level - are in place to promote open and fair competition. Unlike the Special Provisions, these safeguards apply even-handedly to all local telephone companies and protect consumers of all types - residential, commercial, rural, and urban.

ARGUMENT

I. TEXAS HAS A SUBSTANTIAL INTEREST IN HAVING THE CONSTITUTIONALITY OF THE SPECIAL PROVISIONS RESOLVED.

The States have a significant stake in this case. Section 271's requirement that the Federal Communications Commission ("FCC") "consult" with the States in determining whether a particular Bell Operating Carrier ("BOC") has satisfied all of that section's requirements has become a significant undertaking for State public utility commissions throughout the country.

In Texas, the PUC has overseen nine months of hearings before four separate Administrative Law Judges, including a week-long hearing before the Commissioners themselves. Parties have submitted thousands of pages of briefs and other supporting material. After identifying 129 separate issues that are in dispute, the PUC launched a "collaborative process" through which it intends to resolve them.[1] The PUC has established separate

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[1]Commission recommendation, Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications

dockets to investigate SBC's compliance with particular items on the competitive checklist. *See* 47 U.S.C. § 271(c)(2)(B). In short, section 271 has already required a massive undertaking in Texas, and the substantial uncertainty surrounding the constitutionality of the Special Provisions is a serious concern. This Court should grant the petition to resolve this uncertainty and put an end to this potentially needless expenditure of resources.

Texas is not alone. Section 271 proceedings are currently pending in nearly every State, and those proceedings have generally been elaborate – often involving the submission of thousands of pages of prepared testimony, lengthy, formal oral hearings, multiple rounds of briefings, and the participation of numerous private parties, including long-distance incumbents who have a strong incentive to raise every potential argument in order to prevent or at least delay long-distance entry by the BOCs. Given the significant resources that they are currently expending in this process, States have a strong interest in obtaining a prompt, definitive resolution of the constitutional questions surrounding the Special Provisions.

II. THE SPECIAL PROVISIONS HARM BOTH COMPETITION AND CONSUMERS.

A. The Special Provisions Harm Competition and Consumers Generally.

Experience has shown that consumers are not served well by artificial barriers to entry. Instead, open competition, constrained only by requirements of nondiscrimination and interconnection, provides consumers with the best opportunities and value. That is precisely the approach Texas has taken to the telecommunications market in the State. The Special Provisions' restrictions are not needed to cause the BOCs to meet their legal

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Market, PUC Project No. 16251 (PUC June 1, 1998).

obligations. Texas - in conjunction with the FCC, other States, and private parties - is fully capable of - and fully committed to - protecting new entrants and preventing anti-competitive conduct by any incumbent telephone company or any other company. The Special Provisions do nothing more than protect the unrestricted companies from competition and, more importantly, deny citizens a fully competitive telecommunications market.

When incumbent local telephone companies have been allowed to participate in the types of markets from which the Special Provisions now preclude the BOCs, consumers have received substantial benefits without harm to competition. Two examples clearly demonstrate this:

1. Long-Distance Service by SNET and GTE. Although the Telecommunications Act prohibits the BOCs from entering long-distance markets in the regions where they are local exchange carriers, it does not prohibit other incumbent local exchange carriers, such as Southern New England Telephone Company ("SNET") and GTE Corporation ("GTE"), from offering such services or from packaging their local and long-distance services together. Therefore, non-BOC local exchange carriers can provide convenient one-stop shopping to their customers. Importantly, SNET and GTE have made significant competitive gains through aggressive price competition that has directly benefited consumers. Professor Jerry Hausman has estimated that SNET's overall rates are 18% lower on average than AT&T's overall rates (including AT&T's discount plans) and that GTE's rates average 17% lower.[2] Moreover, other long-distance carriers, AT&T and MCI, have responded to this price competition in Connecticut by seeking to lower their rates in that State.

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[2] Declaration of Professor Jerry A. Hausman at 6,8, attached to Reply Comments of BellSouth Corporation in Support of Ameritech Michigan's Application for Provision of In-Region, InterLATA Services, Application of Ameritech Michigan, CC Docket No. 97-137 (FCC filed July 7, 1997).

2. Long-Distance Service in the New Jersey Corridor. When NYNEX and Bell Atlantic were allowed to provide inter local access and transport area (or interLATA) service to in-region customers in two geographic corridors running from New York City and Philadelphia into New Jersey, the local carriers likewise set their prices well below those of the major carriers. In fact, according to AT&T's own figures, Bell Atlantic's corridor rates are as much as one-third lower than AT&T's.[3] As a result, AT&T petitioned the FCC for authority to reduce its long-distance rates for New Jersey customers in these corridors. MCI shortly followed suit, petitioning the FCC "so that [MCI] likewise [would] be in a position to *benefit consumers* by being able to complete effectively against Bell Atlantic and AT&T."[4] In their petitions, both AT&T and MCI frankly admitted that consumers in these corridors are better off than consumers who cannot obtain long-distance service from an incumbent BOC.[5]

Experiences like these make clear that consumers and local economies benefit when competition is truly open. Just as clearly, these experiences reflect that consumers and economies in Texas are being harmed by the Special Provisions. Without the Special Provisions, Texas consumers will be able to share in the lower

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[3] AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration, AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules, CC Docket No. 96-26, Attachment A (FCC filed Oct. 23, 1996,) ("AT&T Waiver Petition").

[4] MCI Comments, AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules, CC Docket No. 96-26 at 1 (FCC filed Nov. 18, 1996)(emphasis added).

[5] See AT&T Waiver Petition at 5 (consumers in the corridors, unlike other areas, "benefit from the highest degree of competition possible"); MCI Comments at 3 ("fully support[ing]" AT&T arguments).

prices and increased innovation that competition brings.[6]

B. The Special Provisions Disproportionately Harm Rural Consumers.

Although the Special Provisions impact most consumers, their effects are particularly harmful to rural communities. By definition, rural consumers live in less densely populated areas and are often in isolated locations that are harder and less profitable to service. Texas believes that removing the restrictions on providing long-distance service, for example, would directly benefit rural citizens with lower long-distance rates, greater selection, and new innovations in the long-distance market. Moreover, removing the long-distance restriction should also prompt long distance carriers to begin to provide competing *local* phone service in rural communities.

As discussed above, one of the principal advantages enjoyed by the long distance companies and other non-BOC local exchange companies is that they can offer their customers one-stop shopping for all of their telecommunication needs. BOCs, solely by virtue of the Special Provisions, cannot offer their customers this advantage. Yet, BOCs are among the most active local exchange carriers in the rural markets. If the BOCs are allowed to provide long-distance service, rural businesses and consumers can expect to see competitors vying for their business (instead of ignoring them, as they are now). Rural consumers deserve the choice that comes from letting all providers offer a full range of services.

Removing the Special Provisions would also likely have a

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[6]A study by the WEPA Group estimates that if the BOCs were permitted into the long distance market, rates in that market would drop by 25% over five years. *See* The WEPA Group, The Economic Impact of Southwestern Bell's Entry into the InterLATA Long Distance Markets in Oklahoma at 18 (Feb. 1998).

beneficial effect on competition in rural local markets. Few, if any, new carriers are offering local service to rural communities, despite the incentives created by the Telecommunications Act. As AT&T has admitted, companies will start to provide local service only "where and when it makes economic sense."[7] Unfortunately, thinly populated rural areas are the most expensive to serve, which means, as the FCC has acknowledged, that "it is unlikely that there well be competition in a significant number of rural, insular, or high cost areas in the near future."[8] Even in those areas where there has been some activity, new entrants have generally focused on larger commercial customers, targeting the most immediately profitable consumer while leaving smaller businesses and residents without significant, if any, competition for their business.

Many state regulators have decided that the only way to turn this prognosis around and convince long-distance carriers to enter the rural local markets is to allow the BOCs into long-distance. For instance, the Oklahoma Corporation Commission recently told the FCC that it "believes that the best and quickest way to get [competition in the Oklahoma local market] would be for the FCC to approve" SBC's request for authority to provide long-distance service.[9] Likewise, the Public Service Commission of South Carolina concluded, in recommending that BellSouth be allowed to provide long distance for its South Carolina customers, that:

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[7] AT&T 1996 Annual Report at 3.

[8] FCC Common Carrier Bureau, Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms, at 27 (Feb. 23, 1996) ("[U]rban markets are cheaper to serve than rural markets."); Report and Order, Federal - State Joint board on Universal Service, CC Dkt. No. 96-45, at 324 (May 9, 1997).

[9] Comments of Oklahoma Corporation Commission on the Application of SBC Communications Inc., Southwestern Bell Telephone Company and Southern Bell Long Distance for the Provision of In-region InterLATA Services in Oklahoma, CC Dkt. No. 97-121, at 11 (Apr. 30, 1997).

> local competition may speed up considerably upon the lowering of the barrier to [BellSouth] competing for long distance business. Lowering this barrier will create real incentives for the major [interexchange carriers] to enter the local market rapidly in South Carolina, because they will no longer be able to pursue other opportunities secure in the knowledge that [BellSouth] cannot invade their market. . .[10]

Again, consumers will want one-stop shopping - the ability to buy their local, long-distance, and possibly cellular service from a single provider. To compete effectively, providers will have to offer all levels of service. Thus, the best way to guarantee that rural businesses and communities will receive the benefits of local and long distance competition - lower prices, easier access, and better service - would be to eliminate the Special Provisions' punitive limitations.

C. The Special Provisions Provide An Incentive Not To Compete.

Congress intended the Telecommunications Act of 1996 to be a "pro-competitive, de-regulatory" framework for opening the telecommunications market.[11] Ironically, the Special Provisions discourage long distance companies from establishing precisely that competition at the local level. As the conclusion reached by the Public Service Commission of South Carolina discussed above suggests, those companies have a strong incentive to avoid entering local markets. If they establish local competition, they will necessarily lay the foundation for allowing the BOCs to enter into their other established markets, *e.g.*, the long distance market. So

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[10]Order Addressing Statement and Compliance with 271 of the Telecommunications Act of 1996, at 66-67 (SC PSC July 31, 1997).

[11] S. Conf. Rep. 230, 104th Cong., 2d Sess. 113 (1996).

long as these companies opt to remain relatively inactive in local markets, the Special Provisions work to make it almost impossible for any of the BOCs to demonstrate compliance with the Special Provisions' competitive checklist.

Thus, the Special Provisions promote a unique form of regulatory and litigation gamesmanship that diverts resources and attention from achieving real competition. Under Section 251 of the Act, all incumbent local exchange carriers are obligated to negotiate interconnection agreements with any other telecommunications carrier wishing access. Where agreement cannot be reached, open issues are arbitrated by the State Public Utilities Commissions. Any party may seek review of the resulting agreement in federal court. *See* 47 U.S.C. § 252.

Some major long distance carriers, like AT&T and MCI, seem to be focusing enormous energy and attention on litigation surrounding these interconnection agreements, thus artificially slowing their effective entry into these local exchange markets. Moreover, this litigation appears to be focused primarily on agreements with the BOCs. For instance, AT&T has entered into interconnection negotiations with BOCs in at least 40 States; it has sought federal court review of the resulting agreements in at least 27 of those States. Similarly, MCI has entered into interconnection negotiations with BOCs in 27 States and sought federal court review in at least 22 of those cases. By contrast, AT&T has entered into interconnection agreements with GTE in 25 States; AT&T has initiated federal court review of those agreements in only three States.

The Special Provisions make the specifically named BOCs' entry into other telecommunications markets dependent in large part upon demonstrating vigorous competition in their local exchange markets. It takes at least two to compete and, thus far, the major long distance companies have apparently determined that it is in their economic self-interest to avoid providing the BOCs any

opportunity to enter markets presently restricted by the Special Provisions. It is the Special Provisions alone that create this anti-competitive framework and its harmful consequences.

III. THE SPECIAL PROVISIONS ARE NOT NECESSARY TO PROTECT EITHER COMPETITION OR CONSUMERS.

Moreover, the Special Provisions are unnecessary. First, Sections 251 through 253 of the Telecommunications Act require all incumbent local exchange carriers to open their markets to competition. *See* 47 U.S.C. §§ 251-53. Second, Texas has well-established antitrust laws which prohibit anti-competitive conduct, and which will be agressively enforced. Most importantly, Texas has enacted detailed telecommunications legislation and regulation, designed to ensure healthy competition while requiring nondiscrimination and interconnection.

In 1995, the Texas Legislature passed the Public Utilities Regulatory Act ("PURA95"),[12] which replaced the legal certificated monopoly with open competition in the local exchange. Pursuant to PURA95, hundreds of new certificates of entry have been issued to new entrants. To promote such entry, PURA95 affirmatively required incumbents to interconnect with new entrants, *id.*, §§ 60.141, 60.125, to share their infrastructures with those entrants, *id.*, § 60.163, and to provide them with unbundled network elements, *id.*, § 60.022, and number portability, *id.*, § 60.082. To safeguard Texas consumers, PURA95 also imposed specific nondiscrimination requirements on market participants. And it established certain "competitive safeguards" to ensure "that the rates and regulations of an incumbent local exchange company are not reasonably preferential, prejudicial, or discriminatory but

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[12] TEX. REV. CIV. STAT. ANN. art. 1446c-0 (1995). PURA was amended in 1997 and can now be found at TEX. UTIL. CODE ANN. §§ 11.001-63.063 (1998).

are equitable and consistent in application." PURA95 § 60.001(a).

PURA95 thus has been carefully designed to establish, through the vigilance and expertise of the Texas Public Utilities Commission, a "balance" between "the public interest in a technologically advanced telecommunications system providing a wide range of new and innovative services [and] traditional regulatory concerns for preserving universal service, prohibiting anticompetitive practices, and preventing the subsidization of competitive services with revenues from regulated monopoly services." PURA95 § 3.051(g). Sections 251 and 252 of the Telecommunications Act of 1996 complement PURA95. Indeed, those provisions push the interconnection and resale obligations of incumbent carriers even further.

As long as all participants are protected by these regulatory safeguards, there is simply no need to exclude the BOCs from important and growing markets such as long distance and manufacturing. Thus, the Special Provisions are unnecessary and counterproductive. Ample statutory and regulatory safeguards exist and will be vigorously enforced in each of the States, including Texas.

CONCLUSION

For the foregoing reasons, amicus curiae, the State of Texas, requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

DEBORAH A. VERBIL
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2191

November 19, 1998

COUNSEL FOR AMICUS CURIAE

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No. 98-652

In The

Supreme Court of the United States

October Term, 1998

SBC COMMUNICATIONS, INC., *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, IDAHO, INDIANA, MICHIGAN, MISSISSIPPI, NEW MEXICO, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

GRANT WOODS
Attorney General
TIM DELANEY*
Solicitor General
Arizona Attorney General's Office
1275 West Washington
Phoenix, AZ 85007
(602) 542-3333
**Counsel of Record*

(Other Attorneys General Listed Inside)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

Additional Attorneys General

WINSTON BRYANT
Attorney General of Arkansas
Office of the Attorney General
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201-2610
(501) 682-2007

ALAN G. LANCE
Attorney General of Idaho
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400

JEFF MODISETT
Attorney General of Indiana
Office of the Attorney General
402 W. Washington Street, 5th Floor
Indianapolis, Indiana 46204
(317) 233-4386

FRANK J. KELLEY
Attorney General of Michigan
Post Office Box 30212
Lansing, Michigan 48909-0212
(517) 373-1110

MIKE MOORE
Attorney General of Mississippi
Post Office Box 220
Jackson, Mississippi 39205-0220
(601) 359-3692

TOM UDALL
Attorney General of New Mexico
Post Office Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

W. A. DREW EDMONDSON
Attorney General of Oklahoma
Office of the Attorney General
State Capitol, Suite 112
2300 North Lincoln Boulevard
Oklahoma City, OK 73105-4894
(405) 521-3921

JEFFREY B. PINE
Attorney General of Rhode Island
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400

CHARLES CONDON
Attorney General of
South Carolina
Rembert C. Dennis Office
Building
Post Office Box 11549
Columbia, South Carolina
29211-1549
(803) 734-3970

MARK BARNETT
Attorney General of
South Dakota
500 East Capitol Avenue
Pierre, South Dakota
57501-5070
(605) 773-3215

INTRODUCTION

Although the eleven States submitting this amicus brief took different positions below on Petitioner's Bill of Attainder argument (supporting, opposing, and remaining neutral), they nevertheless unite now to urge this Court to grant the Petition and resolve definitively a matter of great importance to all States: whether Sections 271 through 275 of the Telecommunications Act of 1996, 47 U.S.C. §§ 271-275 (entitled "Special Provisions Concerning Bell Operating Companies") are constitutional. With Section 271 proceedings pending in almost three dozen States (and more anticipated), the amici curiae States recognize that it is in everyone's best interests to have this Court declare whether Section 271 is constitutional. Therefore, while purposefully and assiduously avoiding any analysis herein of the underlying merits, the States for now join together to ask the Court to grant the Petition and resolve whether the public resources being expended on Section 271 proceedings are legitimately required or needlessly wasted.

INTEREST OF THE AMICI CURIAE STATES

Congress has mandated through Section 271 that the States must expend their resources participating in an elaborate, multi-tiered review process to regulate certain telecommunications companies. Specifically, Section 271 requires that before a Bell Operating Company ("BOC") may offer long-distance service originating in any State where it operates, the BOC must satisfy certain conditions relating to opening its local exchange markets to

competition. *See* 47 U.S.C. § 271(b)(1). Thereafter, that State's public utility commission, the United States Department of Justice, and the Federal Communications Commission ("FCC") must review the adequacy of the BOC's compliance efforts. 47 U.S.C. § 271(d)(2)(A), (B). The FCC must "consult" with the State to determine if the BOC has satisfied all of the compliance requirements of Section 271(c). 47 U.S.C. § 271(d)(B). Of necessity then, the State's public utility commission must conduct an independent evaluation to determine whether the BOC has, in fact, complied with the alternative requirements in 47 U.S.C. § 271(c)(1).

This elaborate review process has, in practice, become a burden for State public utility commissions. For example, Section 271 proceedings are pending in almost three dozen States.[1] Those proceedings often are quite elaborate, involving multiple rounds of briefing, formal oral argument at hearings, and participation by several interested parties. Because the Section 271 proceedings require significant State resources, the States have a

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[1] The States with known Section 271 proceedings include Alabama, Arizona, Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, and Section 271 proceedings have essentially been concluded in three other States.

legitimate interest in securing clarification about the constitutionality of Section 271.

REASONS FOR GRANTING THE PETITION

While neither advancing nor disputing the Petitioner's Bill of Attainder arguments, the amici curiae States urge the Court to grant the Petition for three reasons.

First, the constitutional issue that divided the judges in the lower courts deserves this Court's attention. As the Petition emphasizes (at 27-29), the Fifth Circuit majority repeatedly acknowledged confusion as to whether it was even applying the right legal test. That only heightens the need for this Court to step in and clarify the limits of congressional power to single out specified parties for burdens. The opinions of the various federal judges on the constitutionality of Section 271 were split below, with two judges (the majority panel) finding the Act constitutional and two judges (the district court and dissenter) finding it unconstitutional. The confusion caused by their competing opinions likely will engender yet additional litigation elsewhere, thus diverting more public resources to these disputes if this Court does not act.

Second, one of the challenged provisions – Section 271 – essentially requires an extensive process involving significant State resources to review whether a BOC has complied with various conditions before the BOC may provide long-distance service. For example, the Arizona Corporation Commission has had to establish a special procedure to review Section 271 compliance by US West

Communications, Inc., a BOC operating in Arizona. The Commission has ordered that US West must file with the Commission and all interested parties (including the State of Arizona's Residential Utility Consumer Office, twelve private telecommunications companies, and one trade association) detailed information relevant to its compliance with a fourteen-point competitive checklist, derived from Section 271(c)(2)(B), plus information on ten factors concerning the general telecommunications market in Arizona. The Commission has also ordered that the parties may conduct discovery to fully analyze the issues. Thereafter, the Commission may require evidentiary hearings, oral argument, or additional briefing. Given both the State resources required by Section 271, and the split of federal judges on the issue of the constitutionality of Section 271, this Court should grant the Petition and declare whether Congress has properly mandated the expenditure of the States' public resources to handle Section 271 proceedings.

Third, Section 271 litigation is likely to continue because, as a practical matter, the need for BOCs to obtain long-distance approval has given incumbent long-distance service providers enormous incentives to litigate every last issue in the hopes of creating roadblocks to a successful Section 271 application. For instance, one long-distance carrier has brought federal district court suits under Section 252(e)(6) to challenge its interconnection agreements with BOCs in at least 22 States, but, as of a few months ago, that same long-distance carrier had challenged its agreements with GTE (which does not need Section 271 approval) in only three of the twenty-plus States where GTE provides service. In short, Section 271

has spawned litigation, not competition. This Court should take this case and declare whether that litigation is even necessary.

CONCLUSION

The amici curiae States urge the Court to grant the Petition for Writ of Certiorari.

December, 1998

GRANT WOODS
Attorney General
TIM DELANEY*
Solicitor General
Arizona Attorney General's Office
1275 West Washington
Phoenix, AZ 85007
(602) 542-3333

**Counsel of Record*

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Nos. 98-652 and 98-653

In the Supreme Court of the United States

OCTOBER TERM, 1998

SBC COMMUNICATIONS INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

BELL ATLANTIC CORP., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JOEL I. KLEIN
Assistant Attorney General

PHILIP D. BARTZ
Acting Assistant Attorney General

MARK B. STERN
JACOB M. LEWIS
ALISA B. KLEIN
DANIEL L. KAPLAN
DANA J. MARTIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CHRISTOPHER J. WRIGHT
General Counsel

JOHN E. INGLE
Deputy Assistant General Counsel

Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether certain provisions of the Telecommunications Act of 1996 applicable to the activities of the Bell Operating Companies (47 U.S.C. 271-275) constitute "bills of attainder," violate separation of powers principles, or deny those companies the equal protection of the laws.

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In the Supreme Court of the United States

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SBC COMMUNICATIONS INC., ET AL., PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a[1]) is reported at 154 F.3d 226. The opinion of the district court (Pet. App. 54a-73a) is reported at 981 F. Supp. 996.

[1] "SBC Pet." refers to the petition for a writ of certiorari in No. 98-652; "Bell Atl. Pet." refers to the petition in No. 98-653. "Pet. App." refers to the appendix to the petition in No. 98-652. (The appendices to the petitions are identical.)

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1998. The petition for a writ of certiorari in No. 98-652 was filed on October 19, 1998, and the petition for a writ of certiorari in No. 98-653 was filed on October 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree—which became known as the Modification of Final Judgment, or MFJ—that required it to divest its local exchange operations. The newly independent Bell Operating Companies (BOCs) continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service. The BOCs were initially grouped into seven corporate entities known as "Regional Bell Operating Companies." See *United States* v. *AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). After recent mergers, that number now stands at five: Bell Atlantic, BellSouth, SBC Communications, Ameritech, and U S WEST.

The consent decree, overseen for many years by the federal district court in Washington, D.C., prohibited

the BOCs from providing long-distance telephone service, manufacturing telecommunications equipment, and providing information services. In approving the restriction on long-distance service,[2] the district court explained that a BOC, if permitted to enter the long-distance market, could use its monopoly control over local bottleneck facilities (through which all calls must pass) to impede long-distance competition in two principal ways: The BOC could subject competitors to discriminatory terms of access to the local network, and it could cross-subsidize its own long-distance operations with its monopoly local revenues. *AT&T Co.*, 552 F. Supp. at 187-188, 223. The court cited related concerns in approving the restrictions on information services and equipment manufacturing. See *id.* at 189-191.

2. The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, comprehensively overhauled the regulation of all telephone markets. In the "local competition" provisions of the Act, 47 U.S.C. 251 *et seq.*, Congress sought to open local markets to full competition for the first time by requiring all incumbent local exchange carriers (LECs), including

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[2] The district court divided the Bell Companies' collective geographical regions into approximately 160 exchange areas, known as "local access and transport areas" or "LATAs." See *United States* v. *Western Elec. Co.*, 569 F. Supp. 990 (D.D.C. 1983). The relevant restriction in the consent decree permitted the BOCs to provide telephone service "only between points within a single LATA, providing what is, basically, the traditional local telephone service." *United States* v. *Western Elec. Co.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied, 507 U.S. 951 (1993). For ease of exposition, we refer to inter-LATA calls in the vernacular: as "long-distance calls." Such calls should not be confused with the somewhat larger category of "toll calls," which includes some *intra*-LATA calls that the decree permitted the Bell Companies to carry.

the BOCs, to make their networks and services available to new entrants in three distinct but complementary ways. See 47 U.S.C. 251(c)(2)-(4). First, Section 251(c)(2) requires the incumbents to "interconnect" their networks with those of other carriers, and to do so "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." Second, Section 251(c)(3) entitles potential competitors to lease elements of an incumbent's network, again at "just, reasonable, and nondiscriminatory" rates, terms, and conditions. Finally, Section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users. Several important issues concerning those local competition provisions are now pending before this Court in *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 (argued Oct. 13, 1998), and consolidated cases.

Congress also enacted a set of provisions—applicable to the BOCs and "any successor or assign" (47 U.S.C. 153(4)(B) (Supp. II 1996))—that "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing * * * a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *BellSouth Corp.* v. *FCC*, 144 F.3d 58, 66 (D.C. Cir. 1998) (emphasis in original). The most basic of those provisions is Section 601(a) of the 1996 Act, 110 Stat. 143, which terminates the prospective effect of the AT&T consent decree. In place of the decree, Congress created a transitional regulatory framework governing the BOCs' entry into certain new markets, both to ensure orderly progress towards full and fair competition in telecommunications and to give the BOCs a strong incentive to facilitate the realization of that goal.

Section 271 addresses BOC entry into the long-distance market. That provision automatically entitles all BOCs to provide, for the first time, "out-of-region" long-distance services: *i.e.*, long-distance services originating outside the States in which a BOC was authorized to provide local telephone service on the date of the statute's enactment. 47 U.S.C. 271(b)(2), (i).[3] Section 271 also introduces a procedure under which the BOCs may apply to the FCC for authorization to provide, also for the first time, full long-distance telephone service to customers within their "in-region" States. After "consult[ing]" with the relevant state public utility commission, and after both "consulting" with the Department of Justice and giving "substantial weight" to its views, the FCC is to grant a BOC's in-region long-distance application if it finds the following (47 U.S.C. 271(d)): (1) that the BOC has satisfied certain statutory requirements designed to open its local exchange market to competition (47 U.S.C. 271(c)); (2) that, for an interim period, the BOC will conduct its long-distance operations in accordance with the structural separation requirements of 47 U.S.C. 272;[4] and (3)

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[3] Section 271 also provides that the BOCs may immediately provide, to customers located anywhere in the country, "incidental" long-distance services, 47 U.S.C. 271(b)(3), including audio and video programming and commercial mobile services, "gateway information services" linking local customers to information service clearinghouses, and centralized signaling services. See 47 U.S.C. 271(g).

[4] The interim provisions of Section 272 require the BOCs to set up separate affiliates if they wish to engage in manufacturing, origination of most non-incidental in-region long-distance services, or long-distance information services other than electronic publishing or alarm monitoring. 47 U.S.C. 272(a) and (b); see also 47 U.S.C. 272(f) (sunset).

that granting the application would serve "the public interest, convenience, and necessity" (47 U.S.C. 271(d)(3)).

Section 273 separately authorizes a BOC to manufacture and provide telecommunications equipment once the FCC has found that the BOC has satisfied the conditions set forth in Section 271 for providing in-region long-distance service. Finally, Sections 274 and 275 impose short-term restrictions on the BOCs' electronic publishing and alarm monitoring services. Under Section 274, a BOC or BOC affiliate may not, until February 8, 2000, disseminate electronic publishing by means of the BOC's basic telephone service, except through a "separated affiliate" or joint venture. 47 U.S.C. 274(a), 274(g)(2). Section 275 requires BOCs that were not providing alarm monitoring services as of November 30, 1995, to wait until February 8, 2001, to begin doing so. 47 U.S.C. 275(a).

3. Petitioner SBC Communications Inc., through its wholly-owned subsidiaries (Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell), provides local telephone service to customers in Texas, Missouri, Oklahoma, Arkansas, Kansas, Nevada, and California. In April 1997, SBC filed an application under Section 271 to provide in-region long-distance telephone service in Oklahoma. The FCC denied the application on the ground that SBC had not satisfied Section 271's threshold competitive requirements. *In re Application of SBC Commun. Inc.*, 12 F.C.C.R. 8685 (1997), aff'd, 138 F.3d 410 (D.C. Cir. 1998).

Six days after the FCC's decision, SBC, along with its wholly-owned BOC subsidiaries and several other affiliates, filed this suit in the United States District Court for the Northern District of Texas, challenging the constitutionality of Sections 271 through 275. A

number of interested parties ultimately intervened. On December 31, 1997, the district court held that the challenged provisions were unconstitutional bills of attainder. Pet. App. 73a. In a subsequent order, the court stayed its decision pending appeal. *Id.* at 76a-77a.

The court of appeals reversed. The court first held that the challenged provisions of the 1996 Act are not "bills of attainder" because they do not "punish" the BOCs. *E.g.*, Pet. App. 31a-35a. The court also rejected petitioners' claims that the challenged provisions violate the separation-of-powers doctrine (*id.* at 35a-39a) and equal protection principles (*id.* at 39a).[5] Judge Smith, dissenting, would have invalidated the challenged provisions as bills of attainder. *Id.* at 41a-53a.

ARGUMENT

To date, two courts of appeals have ruled on the BOCs' bill-of-attainder challenge to the 1996 Act: the Fifth Circuit below, and the District of Columbia Circuit in *BellSouth Corp.* v. *FCC*, 144 F.3d 58 (1998). Those two courts reached the same conclusion. In *BellSouth*, the D.C. Circuit rejected many of the same arguments that petitioners present here, upheld the constitutionality of Section 274, and observed that the BOCs' constitutional claims were "somewhat undermined by § 274's placement in an Act that as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *Id.* at 66 (em-

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[5] The court of appeals also rejected a First Amendment challenge limited to Section 274. Pet. App. 40a (following *BellSouth*, 144 F.3d at 67-71). Petitioners have not sought this Court's review of that holding, and they have thus waived any First Amendment challenge. Sup. Ct. R. 14(1)(a).

phasis in original). The BOCs recently challenged Section 271 itself before another panel of the D.C. Circuit, and that case is pending. See *BellSouth Corp.* v. *FCC*, No. 98-1019 (D.C. Cir.) (argued Sept. 25, 1998). Unless and until petitioners persuade some court of appeals to depart from the current consensus, there is no need for this Court to consider petitioners' attack on integral provisions of an intricate legislative compromise that they themselves once supported (see Pet. App. 33a-35a).

1. A statute is a "bill of attainder" within the meaning of the constitutional prohibition only if it both applies with specificity *and* imposes punishment. *E.g.*, *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851 (1984). Those two elements are distinct: no regulation, no matter how specific, is a bill of "attainder" unless it is actually "punitive." See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 472-473 (1977); *BellSouth*, 144 F.3d at 64.

This Court employs a common-sense approach in determining what constitutes a "punitive" law for attainder purposes, focusing on "whether the challenged statute falls within the historical meaning of legislative punishment," on "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes," and on "whether the legislative record evinces a congressional intent to punish." See *Selective Serv. Sys.*, 468 U.S. at 852 (internal quotation marks omitted). "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960); see also *Selective Serv.*, 468 U.S. at 855-856 n.15.

The flaw in petitioners' bill-of-attainder challenge here is simple: nothing in the challenged provisions can plausibly be characterized as "punishment."

a. This Court has invalidated statutes as "bills of attainder" only five times in this Nation's history. In each of those cases, the legislature had imposed punitive disabilities on adherents of a despised political movement (either the Confederacy or the Communist Party) that was "thought to present a threat to the national security." *United States* v. *Brown*, 381 U.S. 437, 453 (1965); see also *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Pierce* v. *Carskadon*, 83 U.S. (16 Wall.) 234 (1872); *United States* v. *Lovett*, 328 U.S. 303 (1946). In each of those cases, the Court invalidated the legislation upon determining that the sanctions at issue—reflecting a "judgment censuring or condemning" individuals for their politics (*Brown*, 381 U.S. at 453-454)—were not reasonably related to a legitimate nonpunitive purpose. See, *e.g.*, *id.* at 454-455; *Lovett*, 328 U.S. at 314; *Cummings*, 71 U.S. at 319-320; *Garland*, 71 U.S. at 377-378; see also *Hawker* v. *New York*, 170 U.S. 189, 198 (1898) (discussing *Cummings* and *Garland*).

Nothing about the provisions at issue here resembles the legislation struck down in those five cases. Business regulations based on corporate economic power and incentives, unlike sanctions based on an individual's political affiliation, are a legal commonplace. See, *e.g.*, *Turner Broadcasting Sys.* v. *FCC*, 512 U.S. 622, 664 (1994). They rest not on a desire to "punish" the regulated corporations, but on a recognition of the objective dangers posed by monopoly power. See *North American Co.* v. *SEC*, 327 U.S. 686, 711 (1946).

Here, Congress recognized that the local exchange remains a crucial bottleneck facility for long-distance

and other services; that the BOCs "provide over 80% of local telephone service in the United States" (H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1, at 49 (1995)); and that, as under the consent decree, the distinctive geographical and demographic characteristics of the BOCs' markets justified competitive protections for those markets that were not needed elsewhere (see pp. 17-20, *infra*). Thus, at the same time that it released the BOCs from the prospective effect of the consent decree, Congress enacted Sections 271 through 275, both to give the BOCs incentives to open their monopoly markets to robust competition and, for a transitional period, to preserve a level playing field in the long-distance and other markets. See *SBC Communications Inc.* v. *FCC*, 138 F.3d 410, 412-413 (D.C. Cir. 1998); *BellSouth*, 144 F.3d at 65-66, 70; Pet. App. 7a. As a former FCC chairman told Congress, such restrictions were needed "not because the BOCs are venal," but because, in the absence of such provisions, "they would be following the natural instincts of rational businessmen" in using their monopoly power to defeat competition. *Telecommunications Policy Act (Part I): Hearings Before the Subcomm. on Telecomm. & Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 426 (1990) (testimony of Richard E. Wiley); accord H.R. Rep. No. 559, 103d Cong., 2d Sess., Pt. 1, at 50 (1994) ("as [the consent decree court] has stated, the line-of-business restrictions themselves are not punitive in nature, but are prophylactic measures") (internal quotation marks omitted).[6]

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[6] Petitioners suggest that the market-opening provisions of Sections 251 and 252 suffice to ensure local competition. See SBC Pet. 6-7, 20-21 n.8. That argument is without merit. While Sections 251 and 252 establish a general framework for opening

Those regulatory provisions are thus no more "punitive" in character than the many other statutes that exclude certain corporations from particular lines of business to protect competition or promote other economic goals. See *BellSouth*, 144 F.3d at 65.[7] Such line-of-business restrictions have never been thought to implicate the Bill of Attainder Clause, and for good reason: they do not "fall[] within the historical meaning

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local markets to competition, Congress recognized that those provisions would not achieve full competition overnight. See, *e.g.*, 141 Cong. Rec. S8138 (daily ed. June 12, 1995) (remarks of Sen. Kerrey); *id.* at S8161 (letter from State Attorneys General). Indeed, the FCC's most recent industry survey shows that the incumbent LECs have retained control of approximately 97.5% of all local exchange revenues. See FCC, *Telecommunications Indus. Rev.: 1997*, Tab. 4 (Oct. 1998) (lodged with this Court in No. 97-826). Congress recognized that, by linking removal of the remaining line-of-business restrictions to the development of local competition, the challenged provisions would give the BOCs an important economic incentive to facilitate the process of opening their traditional monopoly markets to full competition.

[7] *E.g.*, *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (affirming FCC regulation proscribing cross-ownership of television station and newspaper in same market); Banking Act of 1933, 12 U.S.C. 24 (Seventh) (prohibiting banks from underwriting or issuing securities); Bank Holding Company Act, 12 U.S.C. 1843(a)(2) (prohibiting bank holding companies, with certain exceptions, from acquiring or retaining "direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company"); see also *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947) (upholding Section 32 of the Banking Act of 1933, which prohibits a partner or employee of a firm primarily engaged in securities underwriting from being a director of a national bank); Federal Credit Union Act, 12 U.S.C. 1759 (restricting federal credit union membership to groups having a common bond of association or occupation, or groups within a well-defined community); Credit Union Membership Access Act, Pub. L. No. 105-219, 112 Stat. 913.

of legislative punishment," and they obviously "can be said to further nonpunitive legislative purposes." *Selective Serv. Sys.*, 468 U.S. at 852; see also *Brown*, 381 U.S. at 453-454 (distinguishing the Banking Act of 1933, which rested on a "general knowledge of human psychology," from laws "censuring or condemning" individuals "thought to present a threat to the national security"). Indeed, petitioners cite *no* case in which any court has invalidated, as "punishment," any restriction on a corporation's entry into any kind of market, let alone entry by corporations as heavily regulated as those here. That fact, together with the very abundance of line-of-business restrictions throughout the national economy, belies petitioners' suggestion (*e.g.*, SBC Pet. 15, 23-24) that there could be something inherently or historically "punitive" about such restrictions.

Despite petitioners' efforts to equate the two (*e.g.*, SBC Pet. 14-15), therefore, economic regulation of this kind is a far cry from legislation designed to punish flesh-and-blood members of vilified political groups by prohibiting them from "practicing a profession" (*Lovett*, 328 U.S. at 315) The challenged provisions do not, of course, prohibit anyone from practicing any profession,[8]

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[8] In any event, even provisions that *do* prohibit individuals from practicing a profession are permissible "'when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing.'" *BellSouth*, 144 F.3d at 65 (quoting L. Tribe, *American Constitutional Law* § 10-5, at 655 (2d ed. 1988), in turn citing *Hawker*, 170 U.S. at 196, and *DeVeau* v. *Braisted*, 363 U.S. 144 (1960)). "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the

nor do they target disfavored political ideologies. Indeed, the challenged regulations do not specifically apply to any particular group of corporate managers or directors. For example, if a BOC were to sell off its network to some other company (say, GTE), that new company, as the "successor or assign" of the BOC (47 U.S.C. 153(4) (Supp. II 1996)), would be no less subject than the BOC itself to the in-region long-distance restrictions of Section 271. Conversely, when a BOC acquires an independent LEC, the 1996 Act does not prohibit the BOC from providing full in-region long-distance service in the newly acquired LEC's local service area (except in States that the BOC itself served before 1996). See 47 U.S.C. 271(i)(1). Those facts further confirm (if further confirmation were necessary) that Congress treated the BOCs differently from other companies because of the nature of the regional markets they serve (see pp. 17-20, *infra*), not because of any desire to "punish" them for misconduct.

b. Petitioners' characterization of the challenged provisions as "punishment" is particularly implausible for an independent reason as well. As the D.C. Circuit recently observed in rejecting the BOCs' bill-of-attainder challenge to Section 274, the 1996 Act "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ, particularly by prescribing in § 271 a method whereby the BOCs can achieve a long-sought-after presence in the long-distance market." *BellSouth*, 144 F.3d at 66 (emphasis in original). Even apart from the benefits the BOCs derive from a defined statutory procedure for full entry into in-region long-distance markets, see *ibid.*, the challenged provisions

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individual comes about as a relevant incident to a regulation of a present situation." *Flemming*, 363 U.S. at 614 (citation omitted).

immediately entitle the BOCs to provide, for the first time, long-distance service to customers outside their local service regions, 47 U.S.C. 271(a) and (b)(2); to provide "incidental" long-distance services to customers anywhere in the country, 47 U.S.C. 271(b)(3); and to play a significantly greater role in activities related to the manufacture of telecommunications equipment, 47 U.S.C. 273.

Indeed, the BOCs themselves have recognized that enactment of the challenged provisions, together with the termination of the consent decree, represents a net benefit for them. As the court of appeals explained (Pet. App. 33a-35a), the BOCs actively supported the Act while it was pending in Congress—not, of course, because they benefited from the local competition provisions (see pp. 3-4, *supra*), but because they very much benefited from the replacement of the consent decree with the new provisions of Sections 271 through 275. As this Court has indicated, legislation cannot be said to "punish" its subjects unless, at a bare minimum, it "depriv[es]" them of "rights * * * previously enjoyed." *Cummings*, 71 U.S. at 320. The most important provision challenged here—Section 271—does not even meet that threshold requirement. See also *BellSouth*, 144 F.3d at 66 (upholding the short-term provisions of Section 274 (see p. 6, *supra*) even though they reimpose certain electronic publishing restrictions that had recently been removed from the MFJ).

c. Because they cannot plausibly characterize the challenged provisions as "punitive," petitioners devote much of their discussion to the provisions' specificity, as though specificity alone could convert a nonpunitive statute into a bill of attainder. But that approach erroneously conflates two distinct issues. The need to show specificity and the need to show punitiveness are sepa-

rate requirements for any bill-of-attainder challenge, and there is "no warrant in the precedents for treating Congress's specification of the BOCs by name as a material element in the *punishment* analysis." *BellSouth*, 144 F.3d at 64 (emphasis added).

Indeed, much of petitioners' argument reads as though this Court had never decided *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). That case involved the constitutionality of a statute enacted shortly after President Nixon's resignation, in response to an agreement he signed regarding the disposition of his presidential records. *Id.* at 432. The statute overrode the agreement and established rules governing disposition of the records. The statute applied to no other records and repeatedly referred to the former President by name. *Id.* at 433-434. The "essence" of President Nixon's constitutional challenge to that statute, like the essence of petitioners' arguments here, was that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." *Id.* at 469-470.

The Court rejected that challenge and upheld the statute. It explained that President Nixon's expansive interpretation of the Bill of Attainder Clause "would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." 433 U.S. at 470. The Court observed that a variety of other valid statutes "also single out identifiable members of groups to bear burdens or disqualifications"; for example, in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court had upheld the "transfer of rail pro-

perties of eight railroad companies to [a] Government-organized corporation." 433 U.S. at 471 n.34. In sum, the Court concluded, just as "mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment * * * even if the law disadvantages an individual or identifiable members of a group," neither does "the mere specificity of a law * * * call into play the Bill of Attainder Clause." *Id.* at 471 n.33.

In *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court revisited this area and reaffirmed the central holding of *Nixon* and similar cases. A valid bill-of-attainder challenge, the Court explained, "requires not merely 'singling out' but also *punishment*." *Id.* at 239 n.9 (emphasis in original). In the absence of punishment, Congress may legislate not just with great specificity, but may in fact "legislate a legitimate class of one." *Ibid.* (internal quotation marks omitted). That principle is fatal to petitioners' bill-of-attainder claim here.[9]

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[9] The lower courts have also repeatedly rejected bill-of-attainder challenges to regulatory statutes directed at named entities. See, *e.g.*, *Fresno Rifle & Pistol Club, Inc.* v. *Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992) (rejecting bill-of-attainder challenge to California statute barring specific brands of assault weapons because "[t]he type of economic punishment about which [the weapons' manufacturers] complain is not of the type 'traditionally judged to be prohibited by the Bill of Attainder Clause'") (quoting *Nixon*, 433 U.S. at 475); *United Nuclear Corp.* v. *Cannon*, 553 F. Supp. 1220, 1226-1228 (D.R.I. 1982) (rejecting bill-of-attainder challenge to Rhode Island statute requiring specific nuclear power company to post $10 million decontamination bond); see also *Nixon*, 433 U.S. at 470-472 & nn. 33, 34; *Maine Cent. R.R. Co.* v. *Brotherland of Maintenance of Way Employees*, 813 F.2d 484, 488-491 (1st Cir.), cert. denied, 484 U.S. 825 (1987).

2. Petitioners challenge, on a variety of grounds, the substance of Congress's distinction between the local-exchange progeny of the Bell System (and "any successor or assign," 47 U.S.C. 153(4)), and the so-called "independent" local exchange carriers. As discussed, that challenge cannot help petitioners' bill-of-attainder claim, because they cannot meet their independent burden of showing that the provisions themselves are "punitive." See *BellSouth*, 144 F.3d at 67 ("the differential treatment of the BOCs and non-BOCs is neither suggestive of punitive purpose nor particularly suspicious"). Petitioners thus alternatively challenge the distinction under equal protection and separation of powers principles. As the court of appeals observed, however, the challenged provisions do "not even arguably" violate those principles. Pet. App. 41a.

a. It has long been settled that federal regulation of ordinary economic activity is consistent with the equal protection component of the Due Process Clause so long as there is a rational basis for any challenged classification. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Dandridge* v. *Williams*, 397 U.S. 471, 484-485 (1970). The provisions challenged here easily meet that test. See Pet. App. 39a.

The provisions establish transitional entry procedures for the companies that had previously been barred, under the AT&T consent decree, from the long-distance and related markets. As the House Energy and Commerce Committee explained, the statute "naturally focuses on the BOCs and their affiliates, because they uniquely [we]re seeking release from restrictions imposed under the MFJ." H.R. Rep. No. 559, *supra*, Pt. 1, at 50. Indeed, other LECs, including Cincinnati Bell, Southern New England Telephone, and Sprint, had already begun to provide long-distance service. See

USTA C.A. Br. 3-5. It was entirely rational for Congress to distinguish between companies that it was admitting into the long-distance market for the first time and companies that had always been free to provide long-distance service.

Congress also reasonably found that the BOCs' monopoly power continued to pose unique concerns for the development of competition, and that those concerns justified the creation of a transitional regulatory scheme in place of the restrictions of the now-vacated consent decree. As the House Judiciary Committee explained, "the Bells alone exercise immense local exchange monopoly power concentrated throughout a vast geographical region; the local exchange operations of even the Bells' closest runners-up are widely dispersed." H.R. Rep. No. 559, *supra*, Pt. 2, at 93.[10] For example, whereas "the BOCs are regions of contiguous states which together serve almost all of the large population centers in the country," H.R. Rep. No. 203, 104th Cong., 1st Sess., Pt. 1, at 32 (1995), "GTE serves less than three percent of America's urban markets," and its operations are chiefly located in "widely dispersed small- and medium-sized cities and suburban and rural territory." *Id.* at 31. For that reason, witnesses told Congress, special legislation was needed to protect competition only in traditional BOC markets: "The potential incentive and ability of a BOC, which

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[10] In evaluating the BOCs' market power, Congress appropriately took into account the fact that no BOC operates independently, because each is wholly owned and operated by a regional conglomerate (of which there were seven at the time of enactment, and of which there are now only five). See p. 2, *supra*. SBC's effort to compare the market power of a hypothetically divested Nevada Bell with that of other local exchange carriers (Pet. 21 n.9) is thus without merit.

controls nearly one-seventh of the country, to disadvantage a competing interexchange competitor, is far greater than for other companies that offer both local and interexchange service." *The Role of the Department of Justice: Hearing Before the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 66 (1995) (testimony of then-Assistant Attorney General Bingaman);[11] see also *BellSouth*, 144 F.3d at 67 ("the differential treatment of the BOCs and non-BOCs" in Section 274 is "quite reasonable").

Finally, the distinction Congress drew—between the corporate successors to the Bell System monopoly and the "independent" telephone companies—was of course the same distinction drawn for many years by the district court that had entered the AT&T and GTE consent decrees. See pp. 2-3, *supra* (discussing basis for decree restrictions). For example, in approving GTE's acquisition of Sprint over objections that GTE should be subject to the same type of restrictions imposed on

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[11] See also *ibid.* ("Even GTE, the largest of the independent companies, generally serves non-urban areas, and its local operations are geographically dispersed. That is why the BOCs were subject to the line-of-business restrictions while GTE was allowed to offer long distance services through a separate subsidiary."). A variety of witnesses emphasized the importance of this distinction. See, *e.g.*, H.R. Rep. No. 850, 102d Cong., 2d Sess, at 93 (1992) (quoting testimony of Professor Monaghan) ("As courts have found, each of the RBOCs has market power significantly greater than the only other comparably sized local exchange carrier, in that GTE's widely dispersed exchanges are primarily rural and suburban in character and otherwise differ from the RBOCs.") (footnotes omitted); *Competitive Status of the Bell Operating Companies: Hearing Before the Subcomm. on Telecomm., Consumer Protection, and Fin. of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 86 (1986) (testimony of then-Assistant Attorney General Douglas H. Ginsburg) (similar).

the BOCs by the AT&T Consent Decree, the district court explained: "Each of the regional [Bell] companies has a very strong, dominant position in local telecommunications in the area in which it serves; GTE's operations, by contrast, are widely scattered." *United States* v. *GTE Corp.*, 603 F. Supp. 730, 737 (D.D.C. 1984). Congress's rationale in enacting Sections 271 through 275 was no less reasonable.[12]

b. Petitioners further argue (SBC Pet. 26; Bell Atl. Pet. 17-23) that the 1996 Act violates separation-of-powers principles because it alters the prospective

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[12] Petitioner Bell Atlantic contends (Pet. 24-28) that economic legislation cannot identify regulated parties by name without violating equal protection guarantees. That argument is irreconcilable with modern equal protection principles, as the court of appeals recognized (Pet. App. 39a). See, *e.g.*, *New Orleans* v. *Dukes*, 427 U.S. 297, 306 (1976) (upholding legislation making special provision for two vendors as against other vendors and overruling *Morey* v. *Doud*, 354 U.S. 457 (1957), "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds"); *Maine Cent. R.R.*, 813 F.2d at 488-491 (refusing to apply heightened scrutiny to legislation "'select[ing] a single person for adverse treatment,'" and holding that, under this Court's precedent, a "classification does not become irrational or unconstitutional solely because it is specific"); see also *Plaut*, 514 U.S. at 239 & n.9 (discussed at pp. 21-22, *infra*); *Nixon*, 433 U.S. at 471 & n.33; *Erb* v. *Morasch*, 177 U.S. 584, 586-587 (1900). Bell Atlantic's reliance (Pet. 27) on the government's brief in opposition to certiorari in *Atonio* v. *Wards Cove Packing Co.*, 513 U.S. 809 (1994) (denying certiorari), is similarly without merit. *Atonio* involved the validity of a provision in a civil rights statute that provided "the plaintiffs in one pending case with significantly less protection against discrimination * * * than the plaintiffs in any other pending case." 98-1767 U.S. Br. in Opp. at 8. The government's filing expressly distinguished the civil rights legislation at issue there from a provision (such as the ones challenged here) that is "solely an economic regulation." *Ibid.*

equitable terms of the AT&T consent decree—albeit, "as a whole," to the *benefit* of the BOCs themselves (*BellSouth*, 144 F.3d at 66). As an initial matter, that argument conspicuously ignores the fact that the only provision of the 1996 Act that directly addresses the consent decree is Section 601(a)(1), 110 Stat. 143, which terminates the decree's prospective effect. Petitioners obviously do not object to that provision. In any event, even if we place that anomaly to one side (see pp. 23-24, *infra*), petitioners' separation-of-powers argument is without merit.

As the court of appeals explained, "Congress may change the law underlying ongoing equitable relief, even if * * * the change is specifically targeted at and limited in applicability to a particular injunction, and even if the change results in the necessary lifting of that injunction." Pet. App. 36a (emphasis omitted). That proposition is firmly rooted in this Court's precedents. In *Pennsylvania* v. *Wheeling and Belmont Bridge*, 59 U.S. (18 How.) 421, 429, 431-432 (1855), the Court upheld a law declaring a particular bridge to be a lawful post road despite a judicial decree to the contrary. Similarly, in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), the Court upheld a statute changing the law that governed two expressly named, pending lawsuits. Finally, in *Plaut*, while invalidating a statute that "*retroactively* command[ed] the federal courts to *reopen* final judgments" (514 U.S. at 219 (emphasis added)), the Court took care to reaffirm the constitutionality of provisions, like those at issue in *Wheeling Bridge* and here, that merely "alter[] the *prospective* effect of injunctions entered by Article III courts" (*id.* at 232 (emphasis added)).

Plaut also refutes petitioners' "not-too-well-defined argument" (Pet. App. 38a) that the specificity of the

challenged provisions could somehow offend separation-of-powers principles even if it does not violate the Bill of Attainder Clause. The problem with the statute at issue in *Plaut*, the Court held,

> consists *not* of the Legislature's acting in a particularized and hence (according to the concurrence) nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized * * *, or that it is not accompanied by an 'almost' violation of the Bill of Attainder Clause, or an 'almost' violation of any other constitutional provision.

514 U.S. at 239. Specificity itself, the Court reaffirmed, does not make a statute unconstitutional: "While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action." *Id.* at 239 n.9. Finally, *Plaut* forecloses the distinction, reasserted here by Bell Atlantic (Pet. 26), between statutes conferring benefits on designated individuals and those imposing burdens on them. The Court explained (514 U.S. at 239 n.9): "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely 'singling out' but also *punishment*, see, *e.g.*, [*Lovett*, 328 U.S. at 315-318], and a case which says that Congress may legislate 'a legitimate class of one,' [*Nixon*, 433 U.S. at 472]." See also *Maine Cent. R.R. Co.*, 813 F.2d at 488-491 (discussed in note 12, *supra*).

3. Bell Atlantic (Pet. 28) encourages the Court to "take the whole case and decide, as well, the severability of the Special Provisions." In fact, that severability issue need never be decided, because the provisions at issue are constitutional. If that were not the case, however, and if those provisions were invalidated, the severability question would indeed become exceptionally urgent.

Invalidation of Sections 271 through 275 would plainly require invalidation of the other major provision of the 1996 Act applicable specifically to the Bell Companies: Section 601(a)(1), which prospectively terminates the effect of the AT&T consent decree. See 110 Stat. 143. That provision and Sections 271 through 275 were enacted together as inextricably related components of "a hard-fought compromise on a massive issue of public policy which, in the end, contained both good and bad elements for the BOCs." Pet. App. 33a; *SBC Communications*, 138 F.3d at 412 (content of 1996 Act "was the subject of great debate," and "[t]he end product was a compromise between the competing factions"). Petitioners cannot plausibly contend (cf. Bell. Atl. Pet. 29) that it would effectuate congressional intent to lop off only the portions of that "hard-fought compromise" that the BOCs dislike. See *BellSouth*, 144 F.3d at 66 n.8.[13] Indeed, if petitioners really believe that

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[13] In passing, Bell Atlantic cites Section 708 of the Communications Act of 1934, 47 U.S.C. 608, which provides as a general matter that invalidation of one provision of the Act shall not affect "the remainder of the Act." See Bell Atl. Pet. 28. (As codified, the word "Act" appears as "chapter"—Chapter 5 of Title 47—which essentially encompasses the Communications Act. See 47 U.S.C. 609.) Bell Atlantic had good reason to give Section 708 only a perfunctory "see also" citation: Unlike most other provisions of the 1996 Act, Section 601(a)(1) of that Act is *not* codified with the

Congress wanted to "punish" them by subjecting them to more onerous conditions than those that existed under the consent decree, they cannot seriously argue at the same time that Congress would have wished to set them free from continuing judicial oversight in the absence of statutory regulation.

Bell Atlantic suggests (Pet. 28) that if invalidation of Sections 271 through 275 would require invalidation of Section 601(a)(1), it would also require invalidation of all the common carrier provisions of the 1996 Act, including the very provisions that this Court is now reviewing in *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826, and consolidated cases. We disagree with that proposition, but we note the following inescapable point. If successful, petitioners' challenge would threaten to unravel much of the 1996 Act, to the great detriment of American consumers.[14] The result of that unraveling could be a return to a telecommunications world dominated by judicial decrees rather than positive lawmaking by Congress and its delegates. Review

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Communications Act, but is merely referred to in the codifier's historical notes. See 47 U.S.C. 152 note (Supp. II 1996). In any event, even if Section 601(a)(1) of the 1996 Act were part of the Communications Act, the obvious interrelationship between that provision and Sections 271 through 275 would rebut any contrary presumption of severability created by 47 U.S.C. 608. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

[14] Petitioners mistakenly invoke the interest of consumers as a basis for granting them full and immediate entry into the long-distance market. SBC Pet. 30. There are two short answers to that argument. First, Congress resoundingly rejected petitioners' view of the best way to promote consumer interest in the long run. Second, invalidation of that congressional judgment would not in any event give petitioners the windfall that they seek for themselves, because, as discussed, Section 601(a)(1) is inseverable from the provisions that petitioners challenge.

of the severability question would be only the first step in a very long process of litigation.

Fortunately, however, this Court need not accept Bell Atlantic's invitation to grant certiorari on that severability question, because there is no reason for the Court to consider petitioners' underlying claims on the merits. As explained above, those claims are unsound. And, so long as the courts of appeals maintain their current consensus to that effect, further review by this Court is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JOEL I. KLEIN
Assistant Attorney General
PHILIP D. BARTZ
Acting Assistant Attorney General
MARK B. STERN
JACOB M. LEWIS
ALISA B. KLEIN
DANIEL L. KAPLAN
DANA J. MARTIN
Attorneys

CHRISTOPHER J. WRIGHT
General Counsel
JOHN E. INGLE
Deputy Assistant General Counsel
Federal Communications Commission

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October Term, 1998

SBC COMMUNICATIONS INC., *et al.*,

Petitioners,

against

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF STATE REGULATORY COMMISSIONS IN OPPOSITION

LAWRENCE G. MALONE
General Counsel to the
Public Service Commission
Of the State of New York
Three Empire State Plaza
Albany, NY 12223-1350
(518) 474-2510

Dated: December 18, 1998
Albany, NY

(Attorneys continued on inside of cover)

THURBERT BAKER
Attorney General as
Counsel to Georgia Public
Service Commission
47 Trinity Avenue, SW
Atlanta, Georgia 30334
(404) 651-9401

DIANE MUNNS
General Counsel
Utilities Division
Iowa Department of Commerce
350 Maple Street
Des Moines, Iowa 50319-0069
(515) 281-3448

SHELDON M. KATZ
Special Counsel
Vermont Department of
Public Service
112 State Street
Montpelier, Vermont 05601
(802) 828-4014

KAREN FINSTAD HAMMEL
Special Assistant Attorney
General Montana Public
Service Commission
P.O. Box 202601
Helena, Montana 59620-2601
(406) 444-6179

MARYANNE REYNOLDS MARTIN
Assistant Counsel
BOHDAN R. PANKIW
Acting Chief Counsel
Pennsylvania Public Utility
Commission and Commissioners
203 North Office Building
P.O. Box 3265
Harrisburg, PA 17055
(717) 787-4518

MYRA L. KAREGIANES
General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, Ill 60601
(312) 793-8184

DAVID A. VOGES
Assistant Attorney General and
Counsel to the Michigan Public
Service Commission
6545 Mercantile Way, #15
Lansing, Michigan 48911
(517) 334-7667

PENNY BAKER
Deputy General Counsel
Missouri Public Service
Commission
P.O. Box 360
Jefferson City, Missouri 65102
(573) 751-6651

(Attorneys Continued)

CHARLES D. GRAY
J. BRADFORD RAMSAY
National Association of Regulatory Utility Commissioners
1100 Pennsylvania Avenue, NW
Suite 603 - Box 684
Washington, DC 20044-0684
(202) 898-2200

MICHAEL S. VARDA
Legal Counsel
Telecommunications Division
Public Service Commission of Wisconsin
P.O. Box 7854
Madison, Wisconsin 53707-7854
(608) 267-3591

W. BENNY WON
Assistant Attorney General
Public Utility Commission of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-4620

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
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QUESTIONS PRESENTED

1. Whether the Telecommunications Act of 1996's "Special Provisions Concerning Bell Operating Companies" (47 U.S.C.§§271-275), which allow 20 companies to compete in the interLATA telecommunications market if certain conditions are met, violate the Bill of Attainder Clause, the separation of powers or the guarantee of equal protection?

2. Whether the challenged "Special Provisions" are severable from the remainder of the Telecommunications Act of 1996?

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No. 98-652, 98-653

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-v-

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Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF STATE REGULATORY COMMISSIONS IN OPPOSITION

The State Regulatory Commissions respectfully oppose the petitions for writs of certiorari.

The Court of Appeals for the Fifth Circuit, relying on the plain text of the Telecommunications Act of 1996 (the "1996 Act"), the Modified Final Judgment (MFJ) (*see United States v. Western Electric Co.*, 552 F. Supp. 131, 161, 226-234 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983)), and this Court's holdings, concluded that the Special Provisions do not constitute an unconstitutional bill of attainder and are consistent with the separation of powers and equal

protection clauses. *SBC v. Federal Communications Comm'n*, 154 F.3d 226 (5th Cir. 1998). Inasmuch as the Fifth Circuit simply applied well established precedent to often raised issues, the questions raised by the petitions fall far short of this Court's threshold for certiorari.

Statement of the Case

A. Introduction

The MFJ (*see United States v. Western Electric Co.*, 552 F. Supp. 131, 161, 225-234 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983)), categorically prohibited the Bell Operating Companies (BOCs) from competing in the long distance services market. In the Telecommunications Act of 1996, Congress lifted the MFJ's restrictions on BOCs replacing them with the "Special Provisions Concerning Bell Operating Companies." 47 U.S.C. §§271-275. These transitional requirements eliminate several prior restrictions and provide BOCs with an ability to overcome other previously imposed restrictions. Specifically, the bar on BOC provision of interLATA[1] services originating outside its region is completely removed, and if a BOC meets certain requirements, including allowing competitors access to its local telephone markets, it can now provide interLATA service originating within its own region.

The Court of Appeals for the Fifth Circuit followed this Court's precedent construing the Bill of Attainder Clause in

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[1] In implementing the MFJ, the district court established numerous local access and transport areas (LATAs) within which the BOCs were permitted to operate and provide telephone services. *See United States v. Western Electric Co.*, 569 F. Supp. 990, 993-04 (D.D.C. 1983). "InterLATA" service is commonly known as "long distance" service.

determining that the Special Provisions are not a bill of attainder. (U.S. Const. art. I, §10, cl. 1). It decided that Congress' replacement of the MFJ's restrictions with the Special Provisions does not violate the separation of powers clause (U.S. Const. art III, §1). The Fifth Circuit also followed this Court's precedent and concluded that the Special Provisions, as economic regulation, do not violate the guarantee of equal protection (U.S. Const. Amend. V).

The Fifth Circuit's decision does not merit review. This Court has established that punishment is required for a bill of attainder to be found. The Fifth Circuit's determination that punishment is lacking is correct, as the provisions in question are more permissive than those which the provisions replaced. Moreover, the Special Provisions were adopted to achieve an important, non-punitive purpose, a competitive market in the provision of telecommunications services. Finally, there is no valid argument of a violation of the separation of powers, or the guarantee of equal protection. The Fifth Circuit's decision is consistent with precedent and there is no novel issue presented to this Court.

B. Regulatory Background

Under the MFJ, AT&T divested itself of twenty-two local exchange subsidiaries, the Bell Operating Companies (BOCs). Divestiture was required because, "[t]he key to the Bell System's power to impede competition has been its control of local telephone services." *United States v. Western Electric Co.*, 552 F. Supp. at 223, *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

Although the MFJ allowed the BOCs to retain their state-regulated local service monopolies, it subjected the BOCs to various restrictions, including categorical bars from competing in the markets for: 1) interLATA communications; 2) telecommunications equipment;

and 3) information services (including electronic publishing and alarm monitoring). *Id.* at 224. Further, even though every BOC encompassed several local access and transport areas (LATAs), each BOC was only allowed to transmit telecommunications information between points within a single LATA (traditional local service). These restrictions were imposed on the BOCs:

> to ensure that they will not misuse their monopoly power....This standard requires that the Operating Companies be prohibited from providing long distance services, and information services, and from manufacturing equipment used in the telecommunications industry. Participation in these fields carries with it a substantial risk that the Operating Companies will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors.

Id. Other local exchange carriers (LECs) were not subjected to the MFJ's restrictions.

After the MFJ, state legislatures and regulatory agencies began to encourage competition in their local markets. Local competition was slow in developing, however, due to obstacles imposed by the local service monopolists, the BOCs. Nonetheless, many aspects of the FCC's regulations implementing the Act used the states' activities as a framework. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 154999, ¶42 (Aug. 9, 1996).

C. The Telecommunications Act of 1996

The Telecommunications Act of 1996 revamped telecommunications law, requiring competition for both local and long distance services. In reshaping the field of telecommunications, Congress sought to encourage competitive entry into local markets, while providing

BOCs the opportunity to enter the long distance services market. 47 U.S.C. §271.

BOCs are now categorically free to compete out of region. Congress required, however, that a BOC seeking to enter the long distance market in-region show that: (1) it has competitors in its local services market; or (2) no competitor had attempted to enter its local services market in the ten months following enactment of the Act. 47 U.S.C. §§271 (c)(1)(A) and (B). Section 271(c)(2) also sets forth the terms for competitive access that a BOC must provide. Thus, the 1996 Act categorically removed many of the MFJ's restrictions and directly advised BOCs how to remove the remaining restrictions.[2] Moreover, none of the restrictions is permanent.[3]

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[2] In accordance with Rule 15(2) of the Supreme Court, it is noted that the petitioners do not present an entirely accurate version of the Special Provisions. Section 271 now categorically allows a BOC to provide interLATA services originating outside its in-region states, and provide incidental interLATA services originating in any state. A BOC is also allowed to provide interLATA services originating in its region if the FCC finds it satisfies the 14 point "competitive checklist" in section 271(d)(3). In addition, under section 273, BOCs are not prohibited from engaging in close collaborations with any manufacturer during the design and development stages, nor are BOCs prohibited from engaging in research activities related to manufacturing. Further, section 274 does not prohibit a separate affiliate or electronic publishing joint venture from providing electronic publishing, and it provides a BOC who had been offering any electronic publishing services prior to the Act one year from the date of enactment to comply with the section's requirements. Lastly, although section 275 does impose restrictions on BOCs' providing alarm monitoring services, this section does not affect a BOC that was providing alarm monitoring services as of November 30, 1995.

[3] Bell Atlantic's petition, p. 5, incorrectly asserts that some of these provisions are permanent. Section 160 of the 1996 Act, 47 U.S.C. §160, specifically allows the FCC to forbear from applying provisions of the Act. The FCC can forbear from applying sections 272-275 if it determines that enforcement is not necessary. The FCC can forbear from applying section 271 if it determines that the requirements of that section have been fully implemented.

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONS DO NOT RAISE A NOVEL QUESTION OF NATIONAL IMPORTANCE

Petitioner SBC asserts that this Court should grant certiorari because the 1996 Act is a "major enactment" (*see* SBC petition at pp. 29-30). When this Court stated that the 1996 Telecommunications Act is "an unusually important legislative enactment," (*Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2337 (1997)), it surely did not intend that every possible issue in each section warranted this Court's review.

The BOCs' failure to open their markets and meet the conditions for providing in-region interLATA services does not transform a decision applying well established precedent into one of national importance. If BOCs want to provide long-distance telephone service in-region, they merely need to open their local telephone markets and meet the conditions in the Special Provisions.

A. The Fifth Circuit's Decision Applies Well Established Principles

A federal statute, as an act of Congress, is only to be overturned "for the most compelling constitutional reasons." *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747 (9th Cir. 1993), *citing*, *Mistretta v. United States*, 488 U.S. 361, 384 (1989). When a fundamental constitutional right is not at stake, a statute will be overturned only if it is not "rationally-related to a legitimate public purpose." *United States v. Carlton*, 512 U.S. 26, 28 (1994).

The Special Provisions are related to a legitimate public purpose - removing impediments to competition in telecommunications markets. They were not adopted as punitive or discriminatory measures.

These provisions represent a constitutional exercise of Congress' power.

1. The Telecommunications Act's Special Provisions Do Not Violate the Bill of Attainder Clause

The Fifth Circuit correctly held that sections 271-275 of the Telecommunications Act do not represent a bill of attainder. U.S. Const. art. I, §10, cl. 1. This Court has clearly established that a bill of attainder requires three elements: (a) punishment; (b) specification; and (c) the lack of a trial. *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-847 (1984); *Nixon v. Administrator of Gen'l Servs.*, 433 U.S. 425, 468 (1977).[4] As this Court stated in *Plaut v. Spendthrift Farms*, 514 U.S. 211, 239 n. 9 (1995):

> Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid - or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely "singling out" but also "*punishment*," see *e.g.*, *United States v. Lovett*, 328 U.S. 303, 315-18 (1946), and a case which says that Congress may legislate "a legitimate class of one," *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977).

The Fifth Circuit applied this test and correctly determined that there was no violation of the Bill of Attainder Clause.

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[4] State and federal statutes have rarely failed the test of the Bill of Attainder Clause. *See* Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 Hastings Const. L.Q. 767 (1973). In fact, between 1868 and 1965, the U.S. Supreme Court voided only two state and two federal enactments under the Bill of Attainder Clause (*Id.* at 929). The 1965 case of *United States v. Brown*, 381 U.S. 437 (1965), was the fifth (and last) time this Court found a statute in violation of the clause.

The petitioners would have this Court ignore the three part test, including the need for punishment, on the ground that because the Special Provisions apply only to BOCs they are an unconstitutional bill of attainder (*see* SBC petition at p. 20; Bell Atlantic (BA) petition at pp. 10-16).[5] However, this Court has clearly required that more than specificity be found.[6] *See, Nixon*, 433 U.S. at 471 n. 33 ("the mere specificity of law does not call into play the Bill of Attainder Clause.") Thus, that the Special Provisions apply only to the largest providers of local telephone service (BOCs) is not sufficient for a bill of attainder violation to be found.[7]

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[5] The Special Provisions relate only to BOCs due to the BOCs' unique characteristics. The BOCs have been and continue to be subject to regulation because their business affects the public interest, and they wield inordinate power in the marketplace by virtue of their control over local telephone service in large areas across the country. Congress noted that the BOCs alone exercise immense local exchange monopoly power concentrated throughout a vast geographic region. H.R. Rep. No. 103-559, pt. 2, at 93 (1994). In fact, the court in *United States v. GTE Corp.*, 603 F. Supp. 730, 737 (D.D.C. 1984), distinguished BOCs from other carriers, subjecting other carriers, specifically GTE, to different restrictions. Moreover, only BOCs were subject to the MFJ. As noted in *United States v. Brown*, 381 U.S. 437, 454 (1965), as legislation can require that a person who possesses certain characteristics must abstain from certain activities, legislation can use a shorthand phrase to summarize the characteristics with which it is concerned. Congress used "BOCs" as a shorthand way to reflect their unique characteristics.

[6] In *Nixon, supra*, this Court addressed a statute regarding the disposition of President Nixon's records. The statute applied to no other records, and repeatedly referred to President Nixon by name. This Court rejected the argument that Congress' singling out individuals was unconstitutional, because this "view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." *Id.* at 470. The Court concluded that Congress' motivation was not punitive. Thus, there was no bill of attainder.

[7] Courts have also rejected bill of attainder challenges to statutes imposing burdens on specific corporations. In *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992), the court held that

a. The Bell Operating Companies Have Not Been Punished

The fact that a party may feel burdened by federal action does not mean the party has been "punished." *Selective Serv. Sys. v. Minnesota*, 468 U.S. at 851; *Nixon v. Administrator*, 433 U.S. at 470, citing *United States v. Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring) ("Figuratively speaking all discomforting action may be deemed punishment because it deprives of what would otherwise be enjoyed. But there may be reasons other than punitive for such deprivation.") As a result, there are three necessary inquiries as to whether a statute inflicts forbidden punishment: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a Congressional intent to punish." *Nixon*, 433 U.S. at 473, 475-6, 478; *Selective Serv. v. Minnesota*, 468 U.S. at 852. The Fifth Circuit made these inquiries, and correctly determined that the required element of punishment was not present. *SBC v. Federal Communications Comm'n*, 154 F.3d. 226, 242-44 (5th Cir. 1998).

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a statute which specifically prohibited the manufacture of guns by certain corporations (citing the guns' trade names) was not an unconstitutional bill of attainder. Despite the argument of specificity, the court found that there was no intent to punish. In *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1226-8 (D.R.I. 1982), a statute required the plaintiff to post a seven figure bond. The court noted that earmarking of a person or corporation did not automatically offend the bill of attainder, if it was rational. The court further noted that the statute's specific designation of the plaintiff, though "not representing an ideal choice of statutory language, may be read to designate a legitimate class of one, and does not *per se* constitute an impermissible singling out."

i. Sections 271-275 Do Not Fall Within The Historical Meaning of Punishment

The concept of "attainder" has historically included such actions as legislative passage of a death sentence, forfeiture of property rights, imprisonment, abandonment, or the barring of clergymen and attorneys from practice. *Cummings v. State of Missouri*, 71 U.S. (4 Wall) 277, 327-332 (1866); *Ex parte Garland*, 71 U.S. (4 Wall) 333, 380 (1866); *see Nixon v. Administrator*, 433 U.S. at 474. Similarly, legislative enactments barring individuals from government employment or preventing persons who are, or were, Communists from working as officers of labor unions violate the Bill of Attainder Clause. *United States v. Lovett*, 328 U.S. at 317-318; *United States v. Brown*, 381 U.S. 437, 441 (1965).[8]

The Special Provisions constitute permissible economic regulation. Rather than punish the BOCs, the Act offers them opportunities categorically denied them under the MFJ; that is, the chance to compete in the interstate telecommunications markets. The Bill of Attainder Clause does not impede Congress from imposing restrictions on the manner in which a corporation does business.[9]

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[8] "Courts have consistently regarded the Bill of Attainder Clause... and the principle of the separation of powers only as protection for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). The BOCs are not such a group.

[9] As the court stated in *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 403 (N.D.N.Y. 1987), *vacated as moot*, 888 F.2d 230, 234 (2d Cir. 1989):

> Of course, all modern legislation regulating the economic activities of specific groups might be considered punishments, and the bill of attainder clause, if read too broadly, could be used to cripple the ability of legislators to respond to some perceived social or economic problem by imposing restrictions or limitations on individuals, corporations, or industries which are deemed responsible for the problem. Consequently, the bill of

(Footnote continued on next page)

In fact, this Court noted in *Nebbia v. New York*, 291 U.S. 502, 527 (1934), that "[t]he Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." Moreover, the courts have repeatedly held that the Constitution does not bar government from requiring regulated utilities to allow access to their facilities. *American Paper Inst., Inc. v. American Electric Power Serv. Corp.*, 461 U.S. 402, 418 (1983); *MCI Telecommunications Corp. v. Federal Communications Comm'n*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

The Special Provisions are no different from any number of statutes that prohibit corporations from engaging in certain specified lines of business in order to preserve or foster competition or other economic goals. *See, e.g., Federal Communications Comm'n v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (affirming FCC regulations proscribing cross-ownership of a television station and newspaper in same market); Banking Act of 1933, 12 U.S.C. §24(7) (prohibiting banks from underwriting or issuing securities); Federal Credit Union Act, 12 U.S.C. §1759 (restricting federal credit union membership to groups having a common bond of association or occupation, or groups within a well-defined community). That specific corporations are named does not transform economic regulation into historical punishment. *See, e.g., United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1226-28 (D.R.I. 1982) (rejecting a bill of attainder challenge to a Rhode Island

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attainder clause has been used sparingly in invalidating legislation. It has been applied only to legislation closely paralleling the historical characteristics of common law bills of attainder and bills of pain and penalties, the most important of which is a design to "inflict its deprivation upon the members of the political group sought to present a threat to national security" *United States v. Brown*, 381 U.S. 437, 453 (1965). Bills of attainder historically have been passed in times of war or rebellion or when some menace to domestic tranquility was perceived.

statute requiring a specific nuclear power company to post a $10 million decontamination bond). The Special Provisions are economic regulation; they do not fall within the historical meaning of punishment.

Moreover, as this Court noted in *Selective Serv. v. Minnesota*, 468 U.S. at 853, a statute that perpetually leaves open the possibility of removing the claimed "punitive" measure does not fall within the historical meaning of forbidden legislative punishment. This Court distinguished this situation from those in which past activity serves as "a point of reference for the ascertainment of particular persons ineluctably designated by the legislature" for punishment. *Id.* at 847-48; *see Communist Party of U.S. v. Subversive Activities Control Board*, 367 U.S. 1, 87 (1961); *Cummings v. Missouri*, 71 U.S. (4 Wall) 227 (1866) (the persons in the group disqualified were defined entirely by irreversible acts committed by them). Despite Bell Atlantic's contention as to permanence (BA petition at p.5), the Special Provisions' requirements are far from irreversible. They can be met readily by a BOC's compliance with the conditions, as the restrictions are not based upon "past and ineradicable actions" rather ineligibility "is made to turn upon continuingly contemporaneous fact." *Selective Service*, 468 U.S. at 850-51; *see Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. at 87. Moreover, the Act specifically permits the FCC to forbear from applying these provisions.[10] Thus, they do not fall within the historical meaning of punishment.

ii. The Act Furthers Legitimate Non-punitive Goals

In determining whether the Bill of Attainder Clause is violated, the courts must analyze "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon v.*

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[10] 47 U.S.C. §160.

Administrator, 433 U.S. at 475-476. The Fifth Circuit correctly found that sections 271-275 further the national goal of encouraging competition for local telephone service. *SBC v. Federal Communications Comm'n*, 154 F.3d at 243-44.

The Special Provisions do not reflect any determination of guilt. Rather, they simply recognize that, absent compliance with certain conditions, the BOCs would be able to impede competition in the long distance and local markets.[11] The Special Provisions encourage the BOCs to remove impediments to competition and provide a brief period of protection from BOC entry into particularly vulnerable industries.[12]

The fact that the Special Provisions further non-punitive goals is not contested. Inasmuch as the MFJ did not apply to other LECs (*see United States v. Western Electric Co.*, 552 F. Supp. 131, 161, 226-234 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983)), Congress' decision not to apply the Special Provisions to other LECs certainly does not render the Special Provisions punitive.

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[11] These sections are designed to reduce the prices that residential and business customers pay for local telephone service and improve the quality of that service by bringing the competitive marketplace to the local telephone customer.

[12] For example, Congress noted the importance of having "local competition before allowing the local telephone monopoly into long distance." 141 Cong. Rec. H8276 (daily ed. Aug. 2, 1995) (remarks of Rep. Holden). Thus, the statute contains "provisions to ensure that the local telephone market [i]s open to competition before the RBOCs enter long distance." *Id.* at S697 (remarks of Sen. Kerry). The Senate Committee on Commerce, Science and Transportation noted that the "regulatory provisions are necessary to ensure that RBOCs will not enter the long distance industry at the expense of competition and telephone service ratepayers." S. Rep. No. 103-367, at 30 (1994).

iii. Sections 271-275 Display No Punitive Intent

This Court's third test for ascertaining "punishment" concerns whether the legislative record reflects an intent to punish. *Nixon v. Administrator*, 433 U.S. at 478-484. The necessary legislative intent to take "over the judicial function of punishing an individual for blameworthy offenses" cannot be found in the record of the debate on sections 271-275.[13] *See Nixon v. Administrator*, 433 U.S. at 479.

In *Lovett*, the only case in which the Court has invalidated a statute burdening named individuals as a bill of attainder, the Court detailed the "circumstances leading to [the statute's] passage," *id.* at 307, which included unmistakable evidence that Congress had found the named individuals "guilty" of "subversive activity" according to a definition that the committee created during a full-fledged legislative quasi-trial. *Id.* at 311. This Court has reiterated that there must be "unmistakable evidence of punitive intent" before an act of Congress may be invalidated on this basis. *Selective Service*, 468 U.S. at 855 n. 15; *see Flemming v. Nestor*, 363 U.S. 603, 619 (1960).[14]

The lack of punitive intent is fatal to the petitioners. The petitioners do not contend that the Special Provisions reflect a congressional intent to punish, nor could they because the BOCs have more business freedom than they had before the Act.

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[13] *See* footnote 12, *supra*. The 1996 Act sought to "open all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 124. *See also*, footnote 19, *infra*.

[14] Even when certain prophylactic measures fall within the historical meaning of punishment, they are otherwise regarded where they have nonpunitive goals. *See, e.g., Hawker v. New York*, 170 U.S. 189 (1898); *DeVeau v. Braisted*, 363 U.S. 144 (1960).

b. The Fifth Circuit's Decision is Consistent With Relevant Precedent And the Protections Provided By The Bill of Attainder Clause.

As noted above, the Fifth Circuit properly determined that the Special Provisions are not punitive because, among other things, they do not impose a perpetual bar on the BOCs' entry into any avocation. *SBC v. Federal Communications Comm'n,* 154 F.3d at 242; *see Selective Service, supra.* Thus, the court broke absolutely no new ground in rejecting the BOCs' bill of attainder argument. The Fifth Circuit's recognition of the appropriateness of the "prophylactic exception," *id.* at 242, is supported by the nonpunitive congressional intent and legislative purposes.

Thus, the Fifth Circuit applied this Court's holding in *Selective Service, supra,* when it found that: 1) the Special Provisions are not punitive as they do not impose a perpetual bar on the BOCs' entry into any of life's avocations; 2) the Special Provisions are not punishment because they serve a nonpunitive purpose; 3) the Special Provisions are not punitive because neither their terms nor their legislative history demonstrates evidence of punitive intent necessary to establish a bill of attainder; and 4) the Special Provisions are not punitive as they are part of a larger *quid pro quo.*[15] *SBC*

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[15] It must be noted, however, that there was no "*quid pro quo*" because when Congress provided BOCs the right to some relief from the MFJ it did not take away any right from the BOCs. Rather, the BOCs were subject to competition before the 1996 Act; no company has the right to a monopoly. *See Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 139 (1939) ("[t]he franchise to exist as a corporation, and to function as a public utility . . . creates no right to be free of competition" (footnote omitted)); *American Paper Inst., Inc. v. American Electric Power Serv. Corp.*, 461 U.S. 402, 418 (1983); *MCI Telecommunications Corp. v. Federal Communications Comm'n*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). The 1996 Act merely provided BOCs with an incentive to do that which they were required to do.

v. Federal Communications Comm'n, 154 F.3d at 242-44. As set forth above, these judgments are well supported by precedent.

c. This Court Should Deny Review As It Has Clearly And Repeatedly Set Forth The Bill Of Attainder Test And The Fifth Circuit's Decision Complies With That Test

The petitioners assert that this Court must clear up the claimed "confusion" as to the law concerning bill of attainder (SBC petition at pp. 27-29; *see* BA petition at pp. 16-17). There is no conflict, however, among the federal courts.

The court in *Bellsouth Corp. v. Federal Communications Comm'n*, 144 F.3d 58 (D.C. Cir. 1998),[16] applied this Court's criteria and found that Section 274, one of the Special Provisions at issue here, was not a bill of attainder because it was not punitive. The result and rationale in *Bellsouth* are consistent with the Fifth Circuit's decision and this Court's holdings.[17] Thus, this Court's criteria for a bill of attainder are clear, and neither further review nor clarification is warranted.

2. The Special Provisions Do Not Violate The Separation Of Powers Clause

Petitioners' argument that the Special Provisions violate the separation of powers because they specifically apply to the BOCs lacks merit. (BA petition at pp. 18-19; *see* SBC petition at p. 26). The majority

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[16] Petitions for rehearing pending.

[17] The petitioners' mischaracterize as "uncertainty" the Fifth Circuit's discussion of the history of this Court's decisions in bill of attainder cases. The Fifth Circuit's decision complies with the criteria set forth by this Court in its most recent decisions, *Nixon* and *Selective Service*.

of this Court in *Plaut v. Spendthrift Farms*, 514 U.S. 211, 238 (1995), rejected a very similar argument, stating:

> The nub of that infringement [separation of powers] consists *not* of the Legislature's acting in a particularized and hence (according to the concurrence) nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action.

The Court further noted that the premise, propounded here by Bell Atlantic, that there is something wrong with particularized legislation, is questionable. *Id.* at n. 9. This Court has upheld congressional action affecting the rights of specific groups. *See* Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C. App. 520(4) (prospectively authorizing courts to reopen judgments against members of the Armed Forces entered while they were on active duty); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992) (Court unanimously rejected a separation of powers challenge to legislation enacted specifically to change the law to resolve two pending disputes, which legislation identified the parties by name and docket number). Thus, the petitioners' separation of powers argument was properly rejected by the Fifth Circuit and does not merit this Court's review.

The Special Provisions are prospective in nature, do not reverse any final judicial determinations, and do not direct that courts make certain findings of fact or decisions. As this Court stated in *Plaut v. Spendthrift Farms*, 514 U.S. at 234, "[t]he finality that a court can pronounce is no more than what the law in existence at the time will permit it to pronounce. If the law then applicable says that the judgment may be reopened for certain reasons, that limitation is built into the judgment itself, and its finality is so conditioned."

3. The Petitioners' Equal Protection Claim Does Not Present A Question Warranting This Court's Review

Petitioner Bell Atlantic argues that the Fifth Circuit erred when it applied the well established deferential "rational basis" review to the Special Provisions (BA petition at p. 24). It is well settled that federal legislation regulating economic activity passes equal protection muster as long as there is a rational basis for a challenged classification. *See, e.g., Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (when economic regulation is challenged as violating the equal protection clause, "this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations"); *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973) (unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, the Court's decisions presume the constitutionality of statutory discriminations and require only that the classification challenged be rationally related to a legitimate interest). The assertion that this economic legislation violates the equal protection clause because it applies only to BOCs is incorrect. *See, e.g., Erb v. Morasch*, 177 U.S. 584, 586-87 (1900) (rejecting an equal protection challenge to a single railroad); *Maine Central R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484, 488-91 (1st Cir. 1987).

The BOCs were the only ones subject to the MFJ, and the only ones found by the House Judiciary Committee to exercise immense local exchange monopoly power concentrated throughout a vast geographic region.[18] Thus, they are a distinct class. Because the BOCs, as a class, are uniquely situated under the MFJ, and conduct the

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[18] H.R. Rep. No. 103-559, pt. 2, at 93 (1994); H.R. Rep. No. 104-203, pt. 1, at 32 (1995).

same business in the same way,[19] subjecting them to the same restrictions certainly does not violate the equal protection guarantee. *Cf. Atchison, T. & S.F. Ry. v. Matthews,* 174 U.S. 96, 103-104 (1899) ("the equal protection guarantee . . . forbids the legislature to select a person, natural or artificial, and impose upon him burdens and liabilities which are not cast upon others similarly situated.") Moreover, in advancing the vital public purpose of promoting fair and open competition, the Special Provisions serve the public interest. *See id.* at 104-106.

B. Sections 271-275 Cannot Be Severed From The Act

Bell Atlantic argues that the Special Provisions are severable from the rest of the Act (BA petition at p. 28). This Court has established that provisions of a statute may not be severed where it "is evident that the Legislature would not have enacted those provisions which are within its power" absent the provisions sought to be held invalid. *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987).

Section 601(a)(1) of the Act prospectively terminated the effect of the MFJ, and specifically replaced those restrictions with the restrictions and conditions in the 1996 Act. These transitional regulations were specifically created to address the competitive implications of terminating the MFJ.[20] Therefore, Bell Atlantic's assertion that the Special Provisions were not a necessary requirement for Congress to adopt the 1996 Act is baseless (*See* BA petition at p. 24). The

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[19] "BOCs and their affiliates . . . uniquely are seeking release from restrictions imposed under the MFJ." H.R. Rep. No. 103-559, pt. 1, at 131 (1994).

[20] The Senate Committee on Commerce, Science and Transportation explained that these measures were designed to "replace the current antitrust prohibition with regulatory safeguards . . ." S. Rep. No. 103-367, at 30 (1994).

legislative history of this Act shows Congress intended the BOCs to enter the long distance business only if they opened their local networks to competition. Thus, Congress specifically replaced the MFJ's restrictions with the Special Provisions of the Act.[21] Inasmuch as Congress inextricably intertwined these sections to promote competition, severance of sections 271-275 would be improper.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

LAWRENCE G. MALONE
General Counsel to the
Public Service Commission
Of the State of New York
Three Empire Plaza
Albany, NY 12223-1350
(518) 474-2510

December 18, 1998

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[21] *See* footnote 12 *supra;* 142 Cong. Rec. S688 (remarks of Sen. Hollings) ("[T]he RBOCs should not be permitted to enter the long-distance market while they retain a monopoly over local telephone service. . . . I am pleased that the conference agreement recognizes that the RBOCs must open their networks to competition prior to their entry into long-distance.") As stated by Senator Kerry, "Removing the restrictions under any other circumstances would give the local telephone company the incentive and ability to recreate the vertical monopoly that the Department of Justice and many others worked so long and hard to dismantle." 141 Cong. Rec. S.8138 (daily ed. June 12, 1996).

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SBC COMMUNICATIONS INC., *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

WILLIAM T. LAKE
JOHN H. HARWOOD II
DAVID G. GRAY
SAMIR C. JAIN
WILMER, CUTLER & PICKERING
2445 M St., NW
Washington, D.C. 20037
(202) 663-6000
Counsel for U S WEST, Inc.

MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K St., NW, Suite 1000W
Washington, D.C. 20005
(202) 326-7900
Counsel for SBC entities

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

WALTER E. DELLINGER
O'MELVENY & MYERS
555 13th St., NW, Suite 500W
Washington, D.C. 20004
(202) 383-5300

DONALD L. FLEXNER
JOHN I. STEWART, JR.
CLIFTON S. ELGARTEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 624-2500
Counsel for SBC entities

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

MARK D. ROELLIG
DAN L. POOLE
ROBERT B. MCKENNA
U S WEST, INC.
1801 California St.
51st Floor
Denver, CO 80202
(303) 672-2861
Counsel for U S WEST, Inc.

JAMES D. ELLIS
LIAM S. COONAN
MARTIN E. GRAMBOW
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, TX 78205
(210) 351-3448
Counsel for SBC entities

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REPLY BRIEF FOR PETITIONERS

The government's defense of the "Special Provisions Concerning Bell Operating Companies" rests not on the Fifth Circuit's analysis—which the government notably fails to endorse—but on the following proposition: those provisions are "no more 'punitive' in character than the many other statutes that exclude certain corporations from particular lines of business to protect competition or promote other economic goals." Govt. Opp. 11. The "very abundance" of these "line-of-business restrictions" allegedly rebuts our argument "that there [is] something inherently or historically 'punitive' " about them. *Id.* at 12. Crucially, however, the line-of-business restrictions cited by the government are all *general* prohibitions that regulate an open, neutrally defined class, for instance by restricting national banks from underwriting securities. *Id.* at 11 n.7.

The Special Provisions are different from such statutes —different in a constitutionally decisive respect. The Special Provisions prevent a closed class of 20 named companies from entering otherwise lawful businesses. It is one thing for Congress to make a generalized judgment that competition will be promoted if certain restrictions are imposed on a neutrally defined class; it is quite another for Congress to legislate no rule at all, but simply to decree that a handful of named parties cannot engage in those activities. There is no legitimate reason for Congress to act by singling out a few disfavored entities by name for such punishment.

That is why, as our petition explained (with no response from the government), a law preventing Citibank alone and by name from engaging in investment banking, or specifying that Microsoft may not sell Internet browsers, would be unconstitutional even if a general law imposing the same disability on a class of banks or software makers would not. The Special Provisions are no different than such hypothetical, plainly unconstitutional statutes, and

they represent an extraordinarily illegitimate—and dangerous—form of lawmaking.

Tellingly, moreover, neither the government nor the long-distance incumbents can find *any* prior instance where Congress passed a law that prevents named companies from engaging in lawful lines of business. Congress's "prolonged reticence" in this regard would be "amazing if such [action] were not understood to be constitutionally proscribed." [1] It is that "prolonged reticence," not any judicial approval of such extraordinary legislative judgments against specific named entities, that explains why there is "*no* case" (Govt. Opp. 12) determining that such restrictions are invalid.

If, contrary to two centuries of practice, Congress *were* free to make individualized—that is, judicial—judgments about which persons, groups, or companies are likely to follow the law and which likely will not and thus must be subjected to special disabilities, the Bill of Attainder Clause woud be utterly devoid of meaning. It would not serve as "a general safeguard against legislative exercise of the judicial function or more simply—trial by legislature." [2] It would be little more than a museum piece.[3]

Thus, as in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), certiorari is warranted here even in the absence of a circuit split so that the Court may address the question of whether a *species* of statute that undermines basic separation of powers principles is outside the scope of

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[1] *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

[2] *United States v. Brown*, 381 U.S. 437, 442 (1965).

[3] Indeed, it is the very starkness of that result that leads both the government and its private supporters to run head-long away from the Fifth Circuit's analysis. As our petition explained, the circuit court's decision essentially decreed that this Court's leading precedents on the Attainder Clause are dead, and that other decisions of this Court on that Clause are too confusing to have serious precedential value. The Fifth Circuit's complete emasculation of that Clause thus stands as an independent danger calling for action by this Court.

Congress's power. Indeed, the D.C. Circuit has just decided the lone remaining case raising the Attainder Clause issue under the 1996 Act (*BellSouth Corp. v. FCC*, No. 98-1019 (D.C. Cir. Dec. 22, 1998)), thus removing any likelihood of further development on this issue in the courts of appeals.[4]

The case for certiorari is also unusually strong because all parties agree that the foundational constitutional issues posed here arise in the context of "an unusually important legislative enactment." *Reno v. ACLU*, 117 S. Ct. 2329, 2337 (1997). Neither the government nor the long-distance incumbents can dispute that this case implicates enormously significant practical issues—issues that are central to the development of the communications networks that touch the lives of every American. Accordingly, it should come as no surprise that twelve States that have taken various positions on the merits have nevertheless urged the Court to grant review so that it may expeditiously "resolve definitively a matter of great importance." Brief of the State of Arizona, *et al.*, as *Amici Curiae* at 1. *See also Amicus Curiae* Brief of the State of Texas at 2-3.

THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE FUNDAMENTAL CONSTITUTIONAL ISSUES POSED BY THIS CASE.

1. The government supplements the primary argument we addressed at the outset—that the Special Provisions are no different from ordinary line-of-business restrictions—with a series of related contentions intended to demonstrate that the Special Provisions are something other than an attempt to punish a few handpicked companies. None is persuasive.

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[4] The D.C. Circuit's decision, which was limited to the constitutionality of 47 U.S.C. § 271, largely followed the analysis of its earlier decision dealing with 47 U.S.C. § 274, and is mistaken for the reasons given in our petition (at 21-22 & n.10). Significantly, all appeals from FCC decisions under section 271 must go to the D.C. Circuit (47 U.S.C. § 402(b)(9)).

First, the government, while acknowledging that the specificity prong of the Attainder Clause test is met here,[5] argues that we "conflate" the issues of specificity and punishment, "as though specificity alone could convert a non-punitive statute into a bill of attainder." Govt. Opp. 14. That contention misstates our argument—and this Court's case law. We do not collapse these two distinct inquiries; rather, our analysis, unlike the government's, recognizes the undeniable fact—a fact crucial to Attainder Clause jurisprudence generally—that the *same prohibition that is constitutionally unobjectionable when applied to a generalized class may in fact constitute punishment when applied to specific individuals.* For instance, while Congress plainly does not impose punishment when it determines that a generally defined group of employees (say, those with less than three years of service) should be laid off, it does inflict punishment when the same disability is imposed on three named individuals. *See United States v. Lovett*, 328 U.S. 303, 316 (1946).

Such person-specific punishment is impermissible *even if*—as the government struggles mightily, but irrelevantly, to demonstrate (Govt. Opp. 9-10, 17-20)—one could later identify a rational basis for selecting only those particular persons for abuse. *See Brown*, 381 U.S. at 449 n.23 ("We think it clear from the Lovett opinion that [the challenged statute] would have been voided even if it could have been demonstrated that no one other than Lovett,

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[5] The long-distance incumbents suggest perversely that the Special Provisions are not person-specific because they apply not only to the 20 named companies, but also to their "successors and assigns." MCI Opp. 17 (citing 47 U.S.C. § 153(4)(B)); *see also* Govt. Opp. 13. In fact, that argument simply underscores the reality that the Special Provisions apply only to a closed class. No one can ever leave, and no one can ever join—no matter how much things change in the future. No matter how large a share of local telephone markets AT&T might gain as a result of its proposed merger with cable telephony provider TCI, it is not subject to these restrictions. And no matter how large a part of local telephone markets any of the 20 BOCs might lose, their local exchange operations are still subject to the restrictions.

Watson and Dodd possessed the characteristics which Congress was trying to reach."). The Bill of Attainder Clause categorically prohibits trial by legislature, even if Congress reaches an arguably "correct" verdict. As Justice Holmes explained, "it is not within the province of a legislature to declare [someone] guilty or presumptively guilty of a crime." *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 86 (1916).

Nor does this analysis ignore *Nixon v. Administrator of General Services*, 433 U.S. 425, 474 (1977). There, the Court rejected President Nixon's Attainder Clause argument because the challenged statute did not constitute punishment *even when imposed on a single person.* In particular, President Nixon was entitled to the full measure of "just compensation" for the congressionally ordered temporary retention of his papers and thus could hardly be said to suffer punishment. *See id.* at 475. By contrast, this Court's precedents teach that if Congress had specified that President Nixon could not practice law or hold public employment, that would constitute an attainder.

Indeed, *Nixon* itself states that laws that "bar[] designated individuals or groups from participation in specified employments" are flatly "*impermissible*" under the Attainder Clause. *Id.* at 474. The government seeks to skirt this aspect of *Nixon*—and the century of this Court's case law repeatedly finding that restrictions on entering specific employments are "punishment"—by proffering a distinction between such laws as applied to corporations and as applied to "flesh-and-blood members of vilified political groups." Govt. Opp. 12. *See id* at 9 (the Special Provisions are "unlike sanctions based on an individual's political affiliation"); MCI Opp. 22. But the Solicitor General notably does not suggest that corporations fall outside the protection of the Attainder Clause—a proposition that, in any event, is belied by *Plaut* (*see* 514 U.S. at 239 n.9) and that even the Fifth Circuit did not accept (Pet. App. 12a n.11). The only way to punish corporations is

through *economic* restrictions of just the kind imposed by the Special Provisions.

In the end, the government's contention boils down to a covert attempt to turn Attainder Clause jurisprudence into a warped and redundant variant of First Amendment freedom of association doctrine—a variant that protects only those groups that can demonstrate some degree of subjective "vilification." But the Attainder Clause is a *structural* limitation on the kinds of statutes that Congress may constitutionally enact, and it protects the liberty of *all* individuals and groups by imposing basic limits on the actions Congress may take. *See* 2 J. Story, *Commentaries on the Constitution of the United States* § 521, at 5 n.1 (1833) ("[T]he first maxim . . . of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate.").

2. Although the long-distance incumbents are careful not to endorse the Fifth Circuit's unbounded and ill-defined "prophylactic exception" to the Attainder Clause, in the end they rely on an analysis that is nearly indistinguishable from the appellate court's, and that just as surely would gut that Clause. In particular, those companies claim that, outside of a self-defined class of what they term "inherently punitive" disabilities—such as the death penalty—even a restriction imposed on specific companies by name may be appropriate if it can be justified (after the fact) by a "reasonable nonpunitive explanation." MCI Opp. 25.

As our petition took great pains to explain, that is plainly incorrect. The suggestion that a law that targets a closed class of named entities for the imposition of punishment, as that term has historically been understood, may nevertheless survive Attainder Clause scrutiny if one can identify a forward-looking, prophylactic purpose, for that law clashes both with the Framers' understanding and with this Court's decisions. Moreover, it replaces a clear, historically grounded approach with an impressionistic, manipulable inquiry into legislative intent. And it does so

solely in an attempt to salvage a form of legislation (laws targeting a closed class of individuals or entities for disabilities) that serves no legitimate purpose—Congress may impose exactly the same restriction by identifying the characteristics that warrant concern on a forward-looking basis and then allowing the other Branches to apply those restrictions to particular entities, after granting them full due process protections. *See* Pet. 16-19.

In any event, the Court has repeatedly held that restrictions on pursuing lawful businesses fall within the historical checklist of impermissible punishments, thus making any further inquiry unnecessary. *See, e.g., Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) ("the list of punishments *forbidden* by the Bill of Attainder Clause . . . include[s] legislative bars to participation by individuals or *groups* in specific employments or professions") (emphasis added); *Nixon*, 433 U.S. at 474 (stating that the same restrictions are "impermissible"). *Compare* MCI Opp. 21 (wrongly suggesting that *Nixon* merely "indicated" that such restrictions "might qualify" as punishment).[6] More generally, as our petition demonstrated (at 17), in case after case this Court has held that the kind of forward-looking purpose posited by MCI does not prevent a restriction from constituting punishment: "[L]egislative intent to encourage compliance with the law does not establish that a statute is merely the legitimate regulation of conduct." *Selective Serv.*, 468 U.S. at 851.

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[6] The long-distance incumbents cite the statement in *Selective Service* that a legislative purpose inquiry is "necessary" in all Attainder Clause cases. But the Court made plain that it was undertaking such additional inquiries only in order "[t]o ensure that the Legislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder" (468 U.S. at 853)—not to limit the historical scope of that clause. Similarly, far from supporting the incumbents' position here, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 324 (1867), establishes that restrictions intended to affect future conduct (instead of obtaining retribution for past acts) were also attainders.

The long-distance incumbents cite cases such as *Hawker v. New York*, 170 U.S. 189 (1898), and *De Veau v. Braisted*, 363 U.S. 144 (1960), in favor of a contrary rule, but those decisions are manifestly inapposite. They involved generally applicable licensing or qualification rules, not rules targeted to a closed class of named parties. Moreover, even if they did stand for the proposition that the ability to hypothesize a forward-looking prophylactic intent for congressional action undermines an Attainder Clause claim, that would merely demonstrate that there is a significant conflict in the Court's case law that calls for resolution in this case. Indeed, as we explained in our petition (at 27-29), the Fifth Circuit itself repeatedly remarked on its uncertainty as to the Court's holdings on this important issue (as well as others)—an uncertainty that strongly argues for a grant of certiorari in this case.

3. Both the government and the long-distance incumbents ultimately seek refuge in arguments about the BOCs' status prior to the 1996 Act and their actions during consideration of the legislation that became the 1996 Act. These arguments are both legally irrelevant and unpersuasive even on their own terms.

The long-distance incumbents assert that the Special Provisions confer "enormous benefits" (MCI Opp. 18) on the BOCs. But, as our petition explained, it is impossible—and, in any event, singularly inappropriate—to judge whether particular private parties are likely to fare better before a specific federal court or a particular federal agency. Such speculation on imponderables can hardly provide the basis for upholding a wholly novel and illegitimate form of legislation.

In any event, we cannot fathom how a statute that *reimposes* restrictions (*see* 47 U.S.C. §§ 274, 275) that the MFJ court had previously *lifted*—and that creates a byzantine and, to date, completely futile process for seeking re-

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[7] Under section 271, the FCC is given veto power under broad statutory criteria even though the generic provisions of the 1996 Act (47 U.S.C. §§ 251-253) deprive each BOC of the state-protected

lief from other restrictions [7]—can be understood as a benefit. In fact, it is no such thing, notwithstanding MCI's self-serving statements to the contrary.

The long-distance incumbents similarly err in relying on the supposed fact that "the BOCs lobbied hard for the very provisions they now attack." MCI Opp. 1. As an initial matter, although this canard has been recycled repeatedly, this Court has made plain that it is legally irrelevant. The fact that "a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation." *New York v. United States*, 505 U.S. 144, 183 (1992).

In any event, the BOCs vigorously *opposed* enactment of special rules applicable to them alone. On no less than three occasions, the BOCs submitted testimony arguing that the Special Provisions would be unconstitutional. *See* Pet. 25-26 & n.13. And the Chairman of SBC Communications testified that singling out the BOCs and tying "our hands in the long-distance arena until there is pervasive competition in the local exchange market" would be "wrong, anti-competitive, counterproductive, and anti-consumer." *Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm.*

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local franchise monopoly that was the rationale for the AT&T Decree. By contrast, Section VIII(C) of the Decree provided that the BOCs could obtain long-distance relief even when they still retained "monopoly power," and even over the government's objection. In almost three years, the FCC has refused to grant any approval of long-distance authority under the new law. And even if it were ultimately to grant relief to a BOC in a particular State, section 271(d)(6) contains a permanent special disability permitting the FCC to withdraw long-distance authority at any time. The FCC has recently made clear that it plans, pursuant to its view of congressional intent, to preserve section 271 as a whip to compel compliance by the BOCs with other statuory and regulatory objectives. *See* Memorandum Opinion and Order, *AT&T Corp. v. Ameritech Corp.*, File Nos. E-98-41 *et al.*, FCC 98-242 ¶¶ 37, 39 (rel. Oct. 7, 1998).

on Commerce, 104th Cong., 1st Sess. 30 (1995) (statement of Edward E. Whitacre, Jr.). Thus, the BOCs plainly did not "waive" their bill of attainder rights; indeed, it is difficult to see what more they could have done to bring the problem to Congress's attention.

4. Finally, both the government and its private party supporters raise severability issues. Those issues can be fully aired when the case is briefed on the merits. A couple of points are worth noting, however. First, Congress was on notice that the BOCs believed the Special Provisions unconstitutional, and it passed section 601 anyway without any indication that the fate of the two were to be linked. Further, the law is settled that "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Here, there can be no concern that the Special Provisions are "so intertwined" with the rest of the Act that "the Court would have to rewrite the law to allow it to stand." *Id.* The BOCs must comply with all generally applicable provisions of the Act—in particular, sections 251 and 252—with or without the Special Provisions. The elimination of those provisions would simply put them on an equal footing with all other similarly situated incumbent LECs, and not subject to specifically targeted penalties, which is, in the end, exactly what the Constitution requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. LAKE
JOHN H. HARWOOD II
DAVID G. GRAY
SAMIR C. JAIN
WILMER, CUTLER & PICKERING
2445 M St., NW
Washington, D.C. 20037
(202) 663-6000

MARK D. ROELLIG
DAN L. POOLE
ROBERT B. MCKENNA
U S WEST, INC.
1801 California St.
51st Floor
Denver, CO 80202
(303) 672-2861
Counsel for U S WEST, Inc.

MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K St., NW, Suite 1000W
Washington, D.C. 20005
(202) 326-7900
Counsel for SBC entities

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4621

WALTER E. DELLINGER
O'MELVENY & MYERS
555 13th St., NW, Suite 500W
Washington, D.C. 20004
(202) 383-5300

DONALD L. FLEXNER
JOHN I. STEWART, JR.
CLIFTON S. ELGARTEN
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 624-2500

JAMES D. ELLIS
LIAM S. COONAN
MARTIN E. GRAMBOW
PAUL K. MANCINI
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, TX 78205
(210) 351-3448
Counsel for SBC entities